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RELIGION, CULTURE AND PUNISHMENT

RETHINKING THE SOCIOLOGY OF PUNISHMENT

BY

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For the Degree of Ph.D



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To my wife

Abstract

The sociology of penal practice has failed methodically to investigate religion as a powerful cultural element in shaping of criminal justice systems. For many years Marxian, Weberian and Foucauldian works have dominated socio-cultural theories of punishment. They were concerned more with fields of class control and disciplinary domination rather than with cultural phenomena such as religion. Technological and bureaucratic analysis of punishment is the dominant discourse in the contemporary sociology of penal practice. Researchers have started to examine more attentively the function and role of culture in the forming of penal policy and in the cultural ramifications of penal practices, and religion as a prominent element of culture, has been the site of intensive social inquiry. However, as yet, investigation into the role of religion as a prominent cultural element in shaping criminal justice system has not been systematically initiated. Whereas the vast majority of scholarly writings in legal subjects have not discussed the relationship between religion and criminal law, the area of criminal justice has in fact been often deeply influenced by religious beliefs. Despite secularist movements during past centuries, there is still common ground between religion, morality and criminal law.

The Durkheimian analysis of religion, society and punishment provides us with a systematic understanding of the relationship between religion and punishment. It is the contention of this thesis that, the religious nature of penal practice can be traced in various forms of penal practice. In Durkheim's terms, sacred moral principles, as the totality of beliefs and sentiments common to the average member of a society are the foundation of social integration, without which society cannot exist. The form and content of these moral principles may undergo transformation from one system to another, but their religious or sacred nature is unchanging. Differences between traditional and modern religions are more a matter of degree than of substance. The present study has undertaken to show that focusing on punishment as a political tactic, managerial technique, or calculated instrument for the purposive control of behaviour is misleading and misses reference to an essential part of penal practice. I have illustrated this argument in two different contemporary societies, the USA and Iran. I have shown that how religious attitudes shaped criminal justice in America and what are the impacts of religious forms of government on criminal law and practice of punishment in the case of Iran. Such a superficial perspective on punishment can be misleadingly taken as pointing to the real substance of punishment. Thus, punishment should not be understood only in terms of complex forms of power and discipline, as Foucault explained or in terms of bureaucratic, professional and managerial considerations as described in a Weberian terms. The time has arrived to take religion seriously as a powerful cultural factor in the sociological study of punishment.

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Chapter 1

Introduction

After the Iranian Revolution in 1979 penal policy profoundly changed towards drug trafficking. The judiciary and political system considered this crime to be a threat to society as a whole. Punishment increased sharply and capital punishment was approved as the best means of dealing with even trivial crimes in this area. As a result drug dealers armed themselves and became more organised, using automatic machine guns against police forces because they had to kill or be killed; the price of drugs increased sharply and drug suppliers became more powerful, richer and more sophisticated. Drug trafficking became a highly profitable and attractive trade. Enormous organised and armed groups entered into the area of drug dealing, and police forces could not tackle them leading to use of the army and other security forces. This process led to a civil war between drug traffickers and the government. From 1998 to 2004, 9573 armed clashes took place; some two million drug dealers were arrested; 11,172 gangs and groups of drug traffickers were detained; and 4000 drug dealers were killed by government forces.¹ Between 1979 and 2005, 3350 police, revolutionary and security forces died as martyrs,² and 10,000 were handicapped in what was seen as a sacred jihad.³ As a result of this process “ 75% of prison space was occupied by criminals who were directly (53%) or

1-Iran Newspaper. 23/9/2005. This statistic does not include those criminals that have been executed. They are killed in armed conflictions against police forces and other governmental forces.

2-Martyred in Islamic culture attributed to those individuals that are killed in a sacred war, in this case war on drug in Iran is considered as sacred war, since those who are scarified themselves are called martyred.

3- Iran Newspaper, Ibid, 'Jihad' itself means sacred war. The terms 'Sacred jihad' is used for more emphasis on its sacredness.

indirectly (22%) connected to drugs.”⁴ Although there are no valid statistics regarding drug related deaths over the last 25 years, there is reasonable evidence suggesting that the number of executions was very high.

The war on drugs was not a single or random event in Iran’s revolutionary penal policy. It was a sign of a general shift in Iran’s penal policy towards a harsh penal practice including retaliation, public execution, public flogging and public shaming. These punishments were particularly targeted at religious, moral and political crimes. Amnesty International termed these kinds of penal practices as “cruel, inhuman or degrading and [urged] the Iranian authorities to end all such punishments.”⁵ Iran is second only to country China in terms of volume of executions.⁶

Iran’s pre- revolution criminal justice system was highly influenced by Western ideas of individualization and rehabilitation. These ideas, at least partly, expressed the overarching philosophy of penal practice in Iran. The Iranian legal system, in particular the Iranian criminal justice system, sought to replicate the Western “criminal justice model, in particular the French penal code. Iran’s penal law was mostly a translation of French penal code”.⁷ Correctionalist methods and treatment were accepted into criminal law and judges had great discretionary powers in the application of these principles. Psychological disorders and other physical illnesses and social deprivations were taken

4 For example, homicides, thefts, immoral crimes and so on can be considered as crimes that are related to drug dealing or addiction.

5 Amnesty International 13/ 08/ 2001

6 Amnesty International, 05/04/2005

7 Mohseni 1997, pp. 41-42

seriously and criminals officially received different treatments for the same crime.⁸

Probation law in 1961 covered various criminal types and categorized them into different groups: the mentally ill, habitual and addicted amongst others, that could receive particular probation orders.⁹ Juvenile delinquents were accorded regimes of treatment different to adults, including various privileged advantages, from irresponsibility to supervision orders by their parents or other social institutions.¹⁰

What caused the tremendous upheaval in the Iranian criminal justice system? How and why did an increasingly modernized penal system turn back and convert into a very traditional criminal justice system? How can one theoretically explain such an unpredictable and unprecedented upheaval in the area of punishment? Which political, cultural and social forces can be considered as capable of creating such a quick and deep transformation? Such a great revolution in the area of criminal justice would suggest the existence of powerful dynamic forces. The question becomes more fascinating through investigation of parallel patterns of change in other modern countries. Finding a convincing social justification in the case of Iran is not very difficult - a cultural and religious revolution had taken place, well known as the Islamic Revolution of Iran - but can one propose a similar social explanation for appearance of traditional, expressive and severe penal practice in the American criminal justice system during last three decades? More specifically what role could a powerful social force like religion play in the sphere of criminal justice in the modern world? The investigation of harsh penal policy in revolutionary Iran and the severity of penal practice in the USA brings up broad

8 Ghorbany 1989, Codes, 22-24

9 Ibid., Article, 3 Probation Law 1961

10 Public Penal Code 1974 Article, Codes 33-36

questions as to the role of religious conceptions in a criminal justice system, and how this might be investigated.

I-Religion and punishment

Religious perspectives must be considered as fundamental in transforming the penal system in Iran. In Iran's religious society corruption and immorality are social evils which must be eliminated. In a society of believers and saints, crime and sin are similarly repulsive and intolerable, because they violate divine rules. In this society it was theoretically assumed that a godly determined penal practice could in the best way eliminate moral corruption. Islamic government, as a product of a religious philosophy and a new political ideology was justified on the basis of the idea that Islamic rules, like Islamic punishments, are derived from divine decrees which could not be implemented without an Islamic government. As Imam Khomeini, the leader of the Islamic Revolution argued:

A body of laws is not sufficient for a society to be reformed. In order for law to ensure the reform and happiness of man, there must be an executive power and an executor. For this reason, God Almighty, in addition to revealing a body of law (i.e., the ordinances of the Shari'ah), has laid down a particular form of government together with executive and administrative institution.¹¹

Consequently, the most crucial role of an Islamic government is the implementation of the Islamic rules. After the Islamic Revolution, politicians were commissioned with these substantial and sacred duties.

¹¹ Khomeini 1981, p. 18

Religion plays a key role in this political and bureaucratic system and gave rise to a profound change in the determination and application of Iranian penal practice. The proximity of socio-political values and institutions to religion gave them a colour of religiosity and sacredness. In such a climate penal policy could have a ruthless approach toward any wrongdoing against social, and even political, values, because every offence against these sacred institutions and the rules that they announced could be seen as a sign of impurity and wickedness and a violation against religion itself.

It may be thought that the involvement of religion in penal policy and the role that it could play in penal practice is a characteristic of traditional and developing societies such as Iran; it is a phenomenon that has not a substantial presence in the majority of modern countries' penal practice. The time for a functional role for religion in criminal justice system areas is past and has become a matter for historical study.

However, a brief study of current penal practices in highly modern and very democratic countries, such as the USA, suggests that this view cannot be entirely accurate. The clock has been turned back in American penal policy and nowadays punishment in the USA is not comparable with its counterparts in western countries in terms of severity. Instead, comparisons with the system of justice of the Taliban in Afghanistan or Nazi Germany have been more appropriate with the reintroduction of traditional sanctions such as chain gangs and public shaming and new styles of punishments like boot camps and electronic monitoring. As the justice system increases criminalization, prosecution of minors as adults, the abandonment of parole,

rehabilitative programs and indeterminate sentences and so on, in the increase cruel and harsh punishments became more apparent. As we will see in chapter four, sending more people to jail for minor offences, application of the death penalty, having the highest rate of incarceration in the world, more than ten times the incarceration rate in Western Europe are aspects of this growing movement toward the severity of penal practice in the USA.

Alongside this growing severity of punishment in the USA, there has been a parallel movement of increasing involvement of religion in American social and political life. This parallel movement may indicate a correlation between the two phenomena. Nowadays Americans "are much more religious than the citizens of other western nations: polls indicate that Americans are the most churchgoing in Protestantism and the most fundamentalist in Christendom."¹² One of the unquestionable realities of American society today is that an extremely high percentage of people believe in God. Virtually all Americans, according to Gallup Princeton Religion Research Centre say they "believe in God or a *"universal spirit"*, 96 percent in the most recent report,"¹³ a figure which has remained stable during recent years. After a long period of conventional separation between state and church in the USA, a new trend in the relationship between the phenomena of religion and penal justice has emerged. The popularity of religion and its entrance into the area of politics has generated a fundamental question: is there any significant connection between growing acceptance of religion and more punitive policy in a very democratic country such as the USA?

¹² Garland 2005, p. 349

¹³ Bishop 1963, p. 2

In the contemporary academic world, religious beliefs and penal practice are rarely taken as parallel topics for serious discussion. Despite the great moral and intellectual powers that religion has had over a variety of penal policies in many countries, "it has not been systematically incorporated into theories of criminal punishment."¹⁴ While scholars have not discussed the relationship between religion and criminal law, "thinking about crime and punishment is, for better or worse, in fact often deeply influenced by religious beliefs."¹⁵ Despite secularist movements during past centuries, there are still common spheres between religion, morality and criminal law: "every religion implies some reward of virtue and punishment of sin."¹⁶ It is true that "religion was, during the 18th century, eradicated from the way legislation was formulated... [but] it did not disappear."¹⁷ The Christian tradition has never totally been removed; it remains (at least in rhetoric) "highly influential in the moral outlooks of a great many people in a variety of countries."¹⁸ Notwithstanding the influential presence of religion as a strong cultural conception in the area of penal practice, it is not discussed as a serious element in the social understanding of punishment. What we see as religious investigations of penal practice are mainly other versions of philosophical studies of punishment, and these studies can be seen as religious justifications or religious philosophy of punishment. The influence of religious ideas on legal theories and theological considerations of crime, criminal and penal practice have been the main theme of such investigations.

14 Savelsberg 2004, p. 375

15 Ibid

16 Stark 2001, p. 619

17 Peter 2004, p. 214

18 Murphy 2003a, p. 262

II-Religion and philosophy of punishment

The relationship between religion and punishment has occasionally been examined in terms of philosophical and legal theories. "Some of the greatest philosophical minds that have addressed the topic of punishment were deeply influenced by Christianity. One thinks of such obvious examples as Augustine, Aquinas and Kant."¹⁹ Such investigations are similar to non-religious philosophical studies of penal practice.²⁰ Equally, the philosophy of punishment and religious studies try to answer how punishment can be justified and why punishment is true. This approach investigates the "contemporary influence of religious thought on legal thought,"²¹ the effects of religious commitments, and the role that these religious values might play in contemporary legal theories.

If non-religious philosophers have offered various justifications for the state's power to prosecute and punish offenders and have resorted to terms like deterrence, retribution, incapacitation and rehabilitation as purposes of punishment, religious thinkers have in turn tried to explain the judicial system in light of theological considerations. For example, these religious philosophers have tried to interpret the question "is (retribution)

¹⁹ Ibid

²⁰ Murphy and Brennan 2003, pp. 259–260

In February 2002, Arizona State University hosted the conference 'Religion and the criminal law - legal and philosophical perspectives'. This conference was sponsored by the College of Law, the Department of Philosophy and the Department of Religious Studies. The basic idea behind the conference was this: Thinking about crime and punishment is, for better or for worse, in fact often deeply influenced by religious beliefs; but these beliefs, in the contemporary secular university, are rarely brought to the table for open discussion, Ibid

²¹ Vining 2003, p. 313

a legitimate objective of a Christian view of punishment?"²² They have justified penal practice "in terms of promotion of the common good and the spiritual reformation of the criminal."²³ They have endeavoured to identify the "religious patterns in attitudes toward criminal punishment."²⁴ Equally, inner dispositions of men, sin and expiation, retribution, rehabilitation, forgiveness and mercy are some other conceptions that are studied from a religious perspective on crime and punishment.

But it seems these philosophical studies have less to say about the function that religion could play in the sphere of penal practice. This is because, as Garland and Young have argued, the leading task of philosophy "is to question 'punishment in general' in the hope of establishing some rationale or justification for the 'right to punish.'"²⁵ A criminal justice system is not made up of legal theories, penological ideas, or some intellectual and philosophical tradition. Rather, what makes "the system is social structure (the way society is organized) and social norms (people's ideas, customs, habits, and attitudes)."²⁶ Penal practice should be studied in its social context and in connection with other social forces. Conformity between penal policy and social standards requires more exploration of the social meanings and social contexts of punishment.

²² Murphy 2003a, p. 270

²³ Ibid, p. 274

²⁴ Savelsberg 2004, p. 373

²⁵ Garland and Young 1983, p. 11

²⁶ Friedman 1993, p. 6

III- Religion and Sociological Studies of punishment

The sociology of penal practice has failed systematically to investigate religion as a powerful cultural element in shaping criminal justice system in the modern world. Sociologists have rarely taken "religion as an analytical tool"²⁷ to investigate penal practice. Religion, as a prominent element of culture, has been the site of intensive social inquiry, but the crucial role that it potentially plays in the shaping of punishment has been overlooked. Moreover, "those who would bring an openly religious perspective to bear, however, are often treated in the academy as though they have done something in rather bad taste."²⁸ The moral, emotional and intellectual powers that religion potentially has in forming penal policy have been ignored and religion has not been methodically brought into theoretical studies on the relationship between punishment and society. Notwithstanding that, the area of criminal justice has been "in fact often deeply influenced by religious beliefs."²⁹

Sociology shaped by predominantly Foucauldian and neo-Marxian perspectives has neglected the study of religion and for many years Marxian, Weberian and Foucauldian works have dominated socio-cultural theories of punishment. For Marx and Foucault penal practice is viewed either as a suppressive apparatus of the ruling class or as an efficient way of normalization in a power-knowledge framework. Marxist and Foucauldian theorizing in the 1970s and 1980s dealt with identifications of the social

27 Green 2005, pp. 102 - 104.

28 Murphy and Brennan, Introduction 2003b, p. 259

29 Savelsberg 2004, p. 375

determinants and functions of penal institutions. They were concerned more with fields of class control and disciplinary domination than with cultural phenomena such as religion.

Although Weber did not directly address penal practice his theory of rationalization, professionalization and bureaucratization was an account of the general trends which have dominated the penal realm for long periods in western countries. Rationality points to the separation of the institution of punishment from its social, cultural and emotional backgrounds like religious convictions. Involvement of expertises and professionals in the process of sentencing and requirements of a bureaucratic system in the criminal justice system can be considered as a strict barrier against the presence of the irrational and non-scientific elements such as religion in shaping of criminal justice system systems.

Foucault argues that modern forms of punishment such as the prison are specific architectural forms of safety and security measures, disciplinary technologies, and a developed administration in which the categorization of time and space must be considered as part of a strategy of power to efficiently manage of individuals and populations. Foucault altered the conventional reading of punishment. From his point of view penal practice is a manifestation of the will to power. For Foucault, punishment in the classical period represents tactics of power. Crime attacks the sovereign physically and the power of the law reacts as the power of the prince. Penal law in modern society, for him, is an instrument of economic, political and social management. Penal policy

should, in a profound sense, be understood as part of a broad strategy for the management of the individual and population. For Foucault there had not been and is no connection between punishment, be it classical or modern, and socio-cultural structures like religion.

However, contrary to Foucauldian thought, Durkheim has considered religion as a translation and embodiment of social forces. If, for Foucault, power-knowledge is a fundamental framework in which the totality of social life should be understood, for Durkheim religion is the foundation for all social institutions. It can be said that religion, for Durkheim, holds the same position as power in Foucault's conception. For Durkheim religion provides "not only an integrative bond, but also is the primordial source of thought, law, morality and ... all social institutions."³⁰ Both Foucault and Weber recognized the crucial sociological role of religion, but they did not systematically use religion as an analytical tool in understanding society and punishment. The Durkheimian analysis of religion, society and punishment, however, provides us with a systematic understanding of the relationship between religion and punishment.

³⁰ Pickering 1975, p. 164

IV Religion, Culture and Garland's Complex Theory of Punishment

The aim of this thesis is to show how culture in general, and religion in particular, contribute to development of penal practice in modern society. Relationships between cultural patterns, social values, and religious beliefs are the main themes of the present study. The two main parts of this study- an investigation of relationship between culture and punishment on the one hand, and the relationship between religion and penal practice on the other hand - are attempting to look at social and cultural meaning of punishment. Since Garland has, more than other thinker, investigated social contexts of penal practice, his work on punishment in modern society, must be a starting point for any contemporary sociological study of punishment. His "splendidly erudite, wide-ranging and thought-provoking study of punishment and modern society,"³¹ is a pre-eminent amongst recent works on the sociological study of punishment in modern society.

His broad and complex approach to the study of penal practice provides us with a comprehensive analysis of theories of social control, legal transformation and social organization. His methodology and the material that is provided by his investigations are sources of great insight in the sociological understanding of punishment. A significant part of Garland's investigations in the area of penal practice has comprised looking at the social and cultural meaning of punishment. In an important sense, culture has been a main theme in his works from *Punishment and Welfare* (1987) *Punishment and Modern Society* (1990), to *The Culture of Control* (2001). As he himself has stated: "my work is

³¹ Murphy W.T (Review Author), 1992,p .497

often seen as being sympathetic to a 'culturalist' approach",³² and a main concern of his works "has certainly been to bring culture back in."³³ For him, punishment is conceived and developed within the medium of cultural languages, symbols and discourse: "Penal laws and institutions are always proposed, discussed, legislated, and operated within definite cultural codes."³⁴ Even if one explains punishment in terms of political and economical interests, for him it remains necessary to explore these cultural meanings.

In Garland's view the term culture is a generic and controversial notion that covers various complex areas of phenomena: "There are almost as many definition of the term as there are anthropologists".³⁵ But, since there are close relationships between culture and patterns of penal action he has tried to provide a definition for this broad term, proposing a broad definition which covers all cognitive and emotional aspects of social life. He defines culture as mentalities and sensibilities. The first term (mentalities) refers to values, system of beliefs, system of ideas and ways of thinking and the second (sensibilities) indicates passions, emotional configurations and ways of feeling.

This study has broadly followed this kind of approach to penal practice and looking at culture through the lens that is provided by Garland. I have attempted to apply his conception of mentalities and sensibilities and explain how these cultural elements have major connotations for the ways that we approach punishment. In chapters three, four and five I have provided special sections to explain how changing modes of penal

³² Garland David See: http://research.yale.edu/ccs/research/working-papers/garland_culturepunish.pdf

³³ Ibid

³⁴ Garland David 1990, p. 198

³⁵ Ibid, p.195

culture regarding, crime, criminology, criminals and other penal conceptions transform the ways that we punish offenders. But, for me, this mode of analysis still needs something more, because changing mentalities and sensibilities is not by itself capable of showing the direction of this transformation in terms of severity or leniency, and we need to distinguish between the importance of different forms of sensibility and mentality.

In other words, this leaves open the fundamental question of how and why social sentiments respond differently to particular categories of conduct in different times and places. Garland has fully explained the transformation of mentalities and sentiments in the late nineteenth- and early twentieth-centuries which gave rise to a more lenient penal policy. He has recognized the cultural resonance of punishment, but his broad description, including both cognitive and emotive aspects of culture, cannot wholly explain the essential nature of punishment. He has argued for the relationship between culture and severe penal practice in USA during the last thirty years. He aptly recognized that there is a kind of correlation between culture in terms of mentalities and sensibilities and penal practice. But for me Garland's theory does not by itself show how, for example, the involvement of social passions gives rise to harsh penal policies. His theory of culture and punishment has remained at the general level. A deeper analysis is required to show how the nature of social values may lead to a gentler or a harsher penal policy. The present study claims that an understanding the role of social beliefs and sentiments in leniency or severity of penal practice is partly dependent on the essence of those social values. It is here that Durkheim re-enters the account.

The narrower Durkheimian description of culture, as a normative aspect of culture or moral culture, establishes a clearer and closer link between culture and penal practice. His conception of culture refers to those aspects of social life, ideas and sentiments, that are accorded a kind of obligatory³⁶, moral and sacred character. Severity of punishment depends on degree of sacredness of those social and moral principles. Indeed, a powerful religious phenomenon can be identified in his analysis of culture, punishment and society. The Durkheimian notion of sacred social principles and religion in society will be applied here as an analytical tool to explain particular aspects of culture and its relation with punishment and society in the modern era. I have applied this sacred aspect of culture in the analysis of two different penal cultures, Iran and USA, to see how this neglected aspect of culture can be significant in understanding penal practice in modern society.

Garland has also recognised a particular form of culture that he terms 'penal culture'. This penal culture for him " is the loose amalgam of penological theory, stored - up experience, institutional wisdom, and professional common sense which frame the actions of penal agents and which lends meaning to what they do."³⁷ Every external value which looks for a change in penal practice, firstly should transform penal culture. Operatives of penal culture such as, judges, probation officers, and prison staff transform cultural notions into penal actions. These experts in turn are affected by a wider cultural context and the demands of public opinion. In one way this analysis is similar to Durkheim's radical description of penal practice as representative of collective

³⁶ Thompson Kenneth 1982, p. 75

³⁷ Ibid, p.210

sentiments. But as mentioned above Garland considers these courses of action as part of a complex procedure of shaping penal practice in modern society, while for Durkheim the process of penal practice is simply viewed as implementation of collective consciousness through the operators of a criminal justice system. However, delineation of "the relationship which link this penal culture to the wider social setting in which it exists,"³⁸ has been part of Garland's concern in the *Punishment and Modern Society*. Equally the present study shall attempt to study relationship between culture in the wider social context, political system, judiciary, executives and other performers in the area of penal policy. In both case studies I will try to show how public opinion, social mentalities, collective sentiments and religious attitudes influence legislation process, sentencing and penal practice.

However, punishment is viewed by Garland as "a complex cultural artefact."³⁹ Cultural forms can influence penal practice through an interactive relation with other cultural forms: "A specific cultural form comes to influence or act upon penal practice only through a process of struggle, compromise, and alliance with a range of competing cultural forms."⁴⁰ Given this, if one considers punishment comprehensively, as a complex cultural artefact, determined "by reference to current mores and sensibilities"⁴¹ and there is interactive relationship between cultural forms, how should one should investigate the role of religion as a crucial cultural factor in shaping penal policy?

³⁸ Ibid

³⁹ Ibid, p. 198

⁴⁰ Ibid, p.209

⁴¹ Garland David 1990 p. 195

Analytically the influence of religion in the area of penal policy can be studied from two perspectives: as a cultural phenomenon which influences penal practices, and as a foundational element of society. From the first of these perspectives, religion is a powerful cultural factor capable of interaction with other social institutions and influencing penal practice in modern society. It is capable of explaining important dimensions of penal practice in both traditional and modern society. From the second perspective, religion functions as a series of sacred principles in society which are the foundation of social coherence. In this case religion more forcefully affects other dimensions of social life, including penal action. In both cases there is an intimate relation between religion and penal practice.

Garland makes no gestures towards seeing religion as a foundational base; he principally views the role religion as that of being one cultural factor amongst others in the historical shaping of punishment. Garland's comprehensive study of punishment's social contexts has not considerably addressed religion as an effective cultural factor in shaping penal practice – or at least he has not chosen to single out religion as a factor of any special influence. Although he acknowledges that "throughout the history of penal practice religion has been a major force in shaping the ways in which offenders are dealt with,"⁴² religion has no a special position in his analysis of punishment and he has even not addressed the role of religion as a cultural factor in forming penal policy in current society. He explains briefly how in primitive societies crime has been associated with sin and impurity and punishment was involved a process of expiation. In this respect he has

⁴² Garland David, 1990 p.203

followed a Durkheimian approach to ancient societies in which culture is religious in character and society reacts harshly against criminal activities.

Garland has briefly mentioned that religion is a cultural factor, "through which we see these individuals (criminals), understand their motivations, and dispose them as cases,"⁴³ but he does not systematically analyse the relation between religion and punishment. He is aware that nowadays Americans, for example, are much more religious than the people of other western countries, mentioning that: "polls indicate that Americans are the most churchgoing in Protestantism and the most fundamentalist in Christendom."⁴⁴ He has described "the conservative call for a return to moral discipline and traditional values"⁴⁵ in the United States, noting that neo-conservatism has introduced into political culture "a strikingly *anti-modern* concern for themes of tradition, order, hierarchy, and authority,"⁴⁶ from the mid-1970s onwards. He has shown that "the demand to get 'back to basics', to resort to 'family values'"⁴⁷ have become a familiar themes in America, but he has not, either generally or in the case of the USA, argued specifically about the role that religion as a cultural factor might play in shaping criminal justice in modern society, or the influences of these religious mentalities and sensibilities in the area of penal practice.

Where he has examined the role of religion as an influential factor in relation to the reformation of the penal policy it is in a historical context. Here he has shown how

⁴³ Ibid, p.195

⁴⁴ Garland 2005, p. 349

⁴⁵ Garland David 2001, p.100

⁴⁶ Garland David 2001, p.99

⁴⁷ Ibid

religion shaped the penal reforms of the eighteenth and nineteenth centuries, "since religious conviction ... tended to play a crucial part in the motivation of those groups (penal reformers) and in their understanding of the reformatory process."⁴⁸ Overall, however, there is no doubt for him that from the medieval period onwards, through the development of modernity, legal systems have become increasingly separated from religious conceptions.⁴⁹ This argument can be seen in the framework of a more general theory in which religion has been removed from the scene of social life in the development of modernity.

This approach is consistent with an implicit theory of modernity underlying his work in *Punishment and Modern Society* which sees that "conditions of modernity lead to increasing secularisation and privatisation of religion."⁵⁰ As a consequence "religion gradually loses its relevance and public influence in modern society."⁵¹ However, I would argue that this is not a suitable approach to the investigation of the relationship between modernity and religion. The contradictions and interactions between modernity and religious belief are still a matter of debate. As I will argue in chapter three, for example, for Max Weber the dominance of secularization, the expansion of industrial production, and finally the expansion of rationalization that occurred in the realms of law, the economy and bureaucracy since the seventeenth century, weakened religious rationality in Western countries' culture. But, one cannot "announce a necessary link between

⁴⁸ Ibid, p.203

⁴⁹ See Ibid, pp.203-209

⁵⁰ Ibid, By secularization we mean the process by which sectors of society and culture are removed from the domination of religious institutions and symbols.

⁵¹ Brady Veronica et al

modernity and a disappearance of religion or of the religious".⁵² It is true that under conditions of modernity the public influence of religion has weakened, but, one cannot clearly show that how and "where the phrase 'disenchantment of the world' attains its full meaning."⁵³ It does not necessarily mean that religious views have been completely removed from the social scene: "Every human society is an enterprise of world-building. Religion occupies a distinctive place in this enterprise."⁵⁴ Since the explanation of human action and social life still has more or less a religious dimension, religion should remain "a viable and fruitful area of research"⁵⁵

Thus, while the present study has clearly been influenced by Garland's sociology of punishment, there are also important differences in how we look at religion, not least because I shall argue that religion is a distinctive cultural factor that continues to have an influence even on modern penal practices. I shall investigate the relationship between religion and punishment from the two different perspectives identified earlier: as a cultural element among the others and as a solution for social disintegration. In relation to the first I shall argue that religion is still actively involved in the formation of penal policy in modern society. As will be shown in the following chapters, religion as cultural factor could push penal system towards either harshness or leniency. Of course, in the two case studies in this thesis religion is considered more in terms of its contribution towards harsh penal practice, but I do not claim that this is always the case. In chapter four, and in particular in chapter five, I have tried to show that how religion could affect

⁵² Lambert Yves

⁵³ Vincent P. Pecora,

⁵⁴ Berger Petri 1967, p.3

⁵⁵ Gill Robin 1977, p.V

mentalities, attitudes, sentiments, public opinion, policy makers and operatives in the area of criminal justice and influence the penal system. This is not claim that religion can explain all the transformations that occurred in two case studies, only that religion is still an important factor in the shaping of penal practice and that the sociology of punishment should not ignore it. Before moving to the second part of this argument - a more detailed discussion of how to study the relation between religion and punishment - I shall briefly explain the role that religion, as a cultural factor, could play in favour of leniency of penal practice.

Although the main question that will be addressed in the present study is how religious ideas and the sensibilities that these bring about, contributed to the development of harsh punishment in contemporary Iran and the United States, this argument cannot fully explain the roles that religion can play in shaping penal justice. Historical studies show that harsh penal practices are not intrinsically associated with the religion as a cultural phenomenon. Indeed, as we will see in the next chapter, Durkheim's theory of penal practice has been criticized because he believed in a kind of correlation between the presence of religion and severe penal practice in primitive societies. Durkheim took his evidence on the legal order from classical antiquity and "appealed to Biblical evidence, arguing that in the Pentateuch there are very few non-repressive laws, and even these are not as foreign to penal law as may appear at first glance, for they are all bear the mark of religion."⁵⁶ However, the idea of a consistent correlation of religion and repressive law in primitive societies has not been accepted by a number of scholars. They have argued exactly the contrary: "that the Torah basically embodied religious and moral exhortations

⁵⁶ Lukes Steven and Scull Andrew 1983 p.11

devoid of punitive backings and existed alongside a legal system distinct from religious affairs and invoking restitution for secular offences.”⁵⁷

I shall try to show in the two cases studies that religion could also drive the criminal justice system towards more lenient forms of criminal justice. The relationship between religion and penal policy is complex and religion should not be analysed as a cultural factor that consistently contributes to creation of a harsh penal policy. Various interpretations of core elements of religion like love of others, forgiveness and mercy, historically had and still have various functions. This is certainly true of the United States, for example, where both the advocates and opponents of capital punishment use biblical references in order to claim the moral high ground.⁵⁸ As “Christianity is compatible with a variety of views, even about capital punishment,”⁵⁹ it has played different roles in leniency and severity of punishments.

The relationship between Christianity and Islam, as two major religions, on the one hand, and penal policy on the other should also not be seen only in favour of severity of punishment. As I will show in chapter five and discuss briefly in following paragraphs as the Christianity,⁶⁰ Islam also does not necessarily contributes to more repressive systems of punishment. On the contrary, the role of religious ideas in less severe punishment,⁶¹ and more humane penal practice is undeniable. The movement that

⁵⁷ Ibid

⁵⁸ Murphy Jeffrie G. 2003b, p.261

⁵⁹ Murphy Jeffrie G 2003a, p. 275

⁶⁰ I am not claiming that these two religions have had similar role towards leniency of penal practice. I have shown in chapters four and five that how the Islam and the Christianity played various roles in severity of penal practice.

⁶¹ Savelsberg 2004, pp. 397-8

formed the penitentiary system and developed the correctional system in the modern era was originally a religious one.⁶² The rehabilitative ideal and the growth of the policies of probation and parole, have also had religious origins. According to Christian doctrine all that was required for the reformation and social adjustment of criminals was repentance and despair. "Generally the exhortation of the prison chaplain, solitary confinement and complete silence so that the delinquent might ponder over the sins of his past, was the cure that was prescribed."⁶³

It is true that historically the Christian religion also contributed to the establishment of a harsh criminal justice through punishing religious crimes like blasphemy, heresy, false swearing, violations of religious values, sodomy, prostitution and so on. But religious ideas also encourage penal law to pursue the rehabilitation and re-education of criminals. For Jonas Hanway⁶⁴ who is considered as part of "a rising evangelical tide that inspired many advocates of reform in the late eighteenth century, reformation means religious conversion."⁶⁵ According to his religious beliefs, penal practice should encourage the individual criminal to reconcile himself to God. The state cannot pardon the sinner, it can merely help him to repent his sin, and seek God's forgiveness. These religious thoughts had been part of the principal early rationales for the establishment of penitentiaries in England "to give prisoners the solitude and serenity necessary to reflect on their crime and seek forgiveness for it."⁶⁶ These institutions "served in the words of an early English statute of penitentiaries by ... solitary

62 see e.g. Ignatieff, Rothman

63 A. Bruce Andrew, 1933 p.18

64 He published *Solitude in imprisonment* in 1776

65 Morris Norval and Rothman David; 1995, p.86

66 Witte John E. et al, 1994. '445

confinement...labour, [and] due religious instruction... to accustom [prisoners] to serious reflection and to teach them both the principles and practices of every Christian and moral duty."⁶⁷ Equally, religious ideas have been part of theories that brought about the penitentiary system in the United States.⁶⁸ And although the penitentiaries have subsequently been come to be seen as harsh regimes, it cannot be doubted that the motives and beliefs that inspired the reformers were to make punishment more humane.

Religion, then, has played a crucial role in the abolition of cruel and physical penal practices and the replacement of these severe punishments by the penitentiary⁶⁹. From the eleventh century on, significant numbers of hospitals, and religious associations devoted themselves to aiding poor, old people, abandoned children and other impoverished people. Prior to 1883 "Quakers in Pennsylvania had done much towards relieving the condition of debtors and accused person in jails."⁷⁰ By the twentieth century, "prisoners came to be included in this category (of the poor)-generally termed "the poor of Christ",⁷¹ and aiding prisoners became a systematic part of the religious charity organizations' activities. A leading role in the revival of penal activism against death penalty in the nineteenth century was occupied by a group of evangelically minded Quakers. They opposed physical punishment, because they believed such punishments gave rise to a hardness and intensity of criminals and brought about more disorder in the prison. They believed in reformation as the only real task of punishment. For them, in a

67 Ibid, P.456

68 Ibid see

69 Morris Norval and Rothman David; 1995 pp12,14,25,26,27,31,56,57,58,432,-33,437

70 A. Bruce Andrew 1993, p.19

71 Morris Norval and Rothman David 1995, p. .26

“well-run prison the prisoner are ruled by kindness; chains are therefore unnecessary.”⁷²

For Quakers the inmates were made obedient by the gentle way of treatment and “the seeming incorrigibility of the criminal was the result not of human nature but of a mistaken punishment.”⁷³

It is true that Islamic philosophy holds that a harsh punishment serves as a deterrent to serious crimes that harm individual victims, or which threaten to destabilize the foundations of society. According to Islamic law, intentional murder can be punishable by death, but forgiveness and compassion are strongly encouraged simultaneously.⁷⁴ I will show in chapter five how these principles play their roles in practice and in forming penal policy in Iran. The murder victim’s family is given a choice of either insisting on the death penalty, or pardoning the perpetrator and accepting monetary compensation for their loss.⁷⁵ I will show there, for example, how planning for delays in the Islamic retaliation rituals of murderers in front of the victim and criminal’s family in Iran save criminals from punishment. Officials and the murderer’s family try to produce an atmosphere of compassion and convince the victim’s family to forgive a miserable man or woman who is spending the last minutes of his life. Indeed, it often happens that the victim’s family remove the rope from the murderer’s neck

The present study mainly focuses on showing how religion has served to produce a harsh justice in Iran, but at the same time I will show how religion has

72 Ibid. p.96

73 Ibid,p.95

74 Quran Sura 5,versus 32 See:

http://islam.about.com/cs/law/a/c_punishment.htm

75 Quran Sura 2, Versus 178 Ibid.

presented significant obstacles to the performance of serious punishment, so that a considerable portion of punishments become, fully or partially, impractical. Mercy in general and mercy for criminals (even murderers) is a Quranic principle.⁷⁶ Following the Islamic law the Supreme Leader,⁷⁷ in various religious or national ceremonies, has exempted partially or fully a large number of convicted criminals from punishment. There are also charitable institutions that pay for those criminals that are jailed because they cannot afford to pay their fines or financial damages.⁷⁸ Victims or their family have no role in the prosecution or performance of penal practice in moral crimes like adultery, homosexuality, and crimes against religion and government. But in such cases Islamic criminal procedure is so complicated that most criminal activities do not lead to punishment. It is as if there was no intention of sentencing or delivering the penalty.⁷⁹ Islamic punishments in committing financial crimes are suspended in the case of poverty and want. According to religious principles and official criminal procedures judiciary officials must not insist on proving the case in moral and religious crimes,⁸⁰ "rather religiously highly recommended that criminal should not confess."⁸¹ Closer attention

76 Quran, Sura 1, Versus 178 and 238

77 According to Constitution law Article 110 supreme leaders is privileged to pardon criminals. For example in last anniversary of revolution 3401 criminals released through his pardon. ISNA. 10-02- 2005

78 A charity institution by the name Emdad Committee paid for 8000 prisoner in 2005 and released them from jail. ISNA. 6/2/2005

79 Present of four impartial and virtuous female witnesses, fully witnessing the sexual intercourse, private and individual questioning of witnesses, and looking for the most trivial difference between their statements as an excuse for their flogging, are examples of procedural obstacles in performance of serious punishments.

80 As a lawyer, I witnessed a case that a man had applied to the court for divorce certification because his wife had committed adultery. His wife was ready to confess, but there was no question about her offence. The judge asked some questions about divorce and issued the divorce certification.

81 There are two famous cases of adultery that managed by prophet Mohammad and Imam Ali: that cited in Sunni and shi' at traditional texts. In both case they tried to prevent from accused confession. They tried implicitly to introduce some reason for their exemption from punishment. In one case Prophet Mohammad threatened the accused and said you confessed three times, if you repeat I have to deliver God's decree. After performance of punishment imam Ali said; I wish he had confessed in front of God not me. One must not disgrace himself. See Hor Amoli 1973, p. 327-8 , ,

shows that, these are almost impossible crimes since the restrictions of proof are so great.”⁸²

As the present investigation will show in chapter five, the procedural regulations and conditions of sentencing in harsh punishments like stoning, cutting off the hand,⁸³ and so on, in Islamic law are so complicated that most of time judges prefer to consider the case as non-religious crimes and follow the case according to non-religious penal laws. The presumption of innocence is, theoretically and constitutionally, an authoritative principle in the Islamic criminal procedure,⁸⁴ which means that judges must be one hundred percent certain in their sentencing: even a trivial hesitation is considered as an absolute obstacle to sentencing an offender to a punishment. Thus, although punishments in the Islamic criminal laws are very severe, there are great obstacles in proving and performing these punishments. These conditions considerably reduce severity of punishment in a criminal justice system.

However, if religion as a cultural factor may contribute to both leniency and severity of punishment, the overall effect of the religion as foundation of society is a harsher criminal justice system. I will discuss in chapter two, three and five that sometimes it is necessary that society resort to religious principles as foundations of

In case of moral crimes like adultery, he or she should confess four times in front of judges, as “confession in front of other officials like inspectors, prosecutors, and police officers are not valid.” See: Official Newspaper 1992, p. 23

82 Ghavami (a clergyman and previous MP) 30-01- 2005 MP ISNA

83 There are around thirty stipulations that must all be met for the performance of the punishment. As I know this punishment is nowadays practically abolished in Iran

84 Constitution law 1990, Article 37, provided that, Innocence is presumed, and no one is held guilty of a charge unless his or her guilty is established by a legally authorized court.

social integration. In this case religion is a fundamental element of social life and at this level generally contributes to harsher forms of punishment. This aspect of the relation between religion and penal practice is not addressed by Garland. Garland's theory can be considered as a Durkheimian⁸⁵ in that he has studied, reconstructed and developed Durkheim's cultural theory of penal practice and he believed that Durkheim "does succeed in opening up important dimensions of the social process of punishment which are not otherwise apparent."⁸⁶ However, he does not address Durkheim's theory of religion and society in his major work on *The Elementary Forms of Religious Life*. In this book Durkheim applied religion as an analytical tool for understanding nature of society, attributing a foundational and independent role to religion in the shaping of society. He, himself, insisted that his theory of society had to be reconsidered in light of his new understanding of religion.⁸⁷

This later Durkheimian approach towards religion and society has important consequences for his social theory, without consideration of which Durkheim's theory cannot be fully understood. In this later work Durkheim does not consider religion as a cultural phenomenon, as he did in his earlier works such as *The Division of Labour* or his writings on law⁸⁸ The present study will argue in more detail, that according to Durkheim's later work, religion is the foundation of social solidarity. I will try to show that, in Durkheim's term, a modern society may shelter traditional values, such as morality and religion as foundations of social integration. In this case religion becomes

85 W.T Murphy 1992,p.498

86 Garland David 1990 p.80

87 See Chapter Two Durkheim On Religion

88 These writing are collected in Lukes & Scull, Durkheim and the Law.

symbol of society itself. As Giddens has argued, Durkheim saw religion as "society becoming conscious of itself, although in a symbolically transmuted form."⁸⁹ In Durkheimian terms, society had to be sheltered under a religious umbrella when social integrity was threatened. Indeed society appeals to religiosity and sacredness as defence mechanisms. It refers to sacred common values as the base of social cohesion, and any violation of these common values gives rise to a harsh reaction. I will endeavour to explain in both case studies that how this process contributes the severity of penal practice.

The present study has not aimed at a comprehensive investigation of the relationship between society, culture and punishment, nor does it attempt a full understanding of the nature of punishment. It does not mean, however, that there is no similarity between this investigation and Garland's sociological study of penal practice. Garland's general framework of study of punishment and, in particular, the great insights that are offered by his theory of culture and punishment have had a considerable influence on my study. His work has been essential to developing an understanding of the different theoretical perspectives, and I have followed many of his insights here in discussing the work of Weber, Foucault, Elias and Spierenburg, and so on. I have not aimed at showing all the advantages or limitations of these various perspectives, nor sought to provide a complex theory of penal practices.⁹⁰ However, I have contrasted technical approaches and rational modes of crime control with investigation of cultural sensibilities and meanings of penal practice. Indeed the common theme of this study and

⁸⁹ Giddens Anthony 1995, p. 20

⁹⁰ See e.g. Garland David 1990b

Garland's theory of punishment, despite other differences, is the focus on culture and its role in creation of penal practice.

V- Durkheim's Sociology of punishment

Durkheim's analysis of punishment and society offers considerable insights into the relationship between penal practice and society. This framework, moreover, may be capable of clarifying analysis of new forms of punishments such as the reappearance of harsh punitive policies in the modern world. These transformations "call us back to Durkheim's ironic vision"⁹¹ in which cultural perceptions in general-and religion in particular- have played a crucial role.

Cultural and expressive features of penal practice have long been out of the field of academic attention. There has been little consideration of social sensibilities, emotions, rituals and cultural resonances in social investigations of punishment. Despite the legacy of Emile Durkheim, the interpretive search for cultural connotations has been displaced by more practical accounts of penal control. Although revival of cultural studies in the sociology of punishment is recent, it seems that the time has come for socio-cultural analyses of penal practice, and a considerable body of writing is now emerging. Researchers have started to examine more attentively the function and role of culture in the forming of penal policy and in the cultural ramifications of penal practices. However, as yet, investigation into the role of religion as a prominent cultural element in shaping criminal justice system has not been systematically initiated.

⁹¹ Sutton 1992,p. 1490

Penal practice is considered by Durkheim to be a social phenomenon directly related to social organization. Punishment is a social action that draws a demarcating line between loyal members of society and others. For Durkheim, "punishment constitutes crime as a symbolic representation of social otherness, and binds group members in an attitude of condemnation."⁹² Both crime and punishment are normal events that functionally strengthen social cohesion. For Durkheim, punishment is a social and passionate reaction invoked in cases of threat to social integration. It is an automatic social self-defence that reinforces social togetherness; a vengeful social reaction against any violation and possible weakening of an otherwise strong state of social solidarity.

However, the central question is, what are the sources of these passionate and vengeful reactions? Why are these punitive social reactions often so harsh? A general discussion of the relationship between cultural perceptions and penal practice does not guide us to any specific analysis concerning the nature of penal practice. Durkheim offers a link between the notions of the *sacred* and of *religion*. The relationship between society and punishment can be understood in light of these fundamental conceptions as the base of social morality and solidarity. Without reference to religion, the content and function of morality and its relationship with punishment are implausible, as there are common sacred and moral principles in all societies. These constitute a functioning base for social integrity. Every encroachment on these areas faces a vengeful response. For Durkheim this is the permanent basis for punishment in all societies and in every stage of social development. This emotional and punitive character of punishment may be modified or disguised, but can never be intrinsically altered.

⁹² Sutton 1992 p, 1490

It is the contention of this thesis that the religious nature of penal practice, nowadays more apparent, can be traced in all forms of penal practice. In Durkheim's terms, sacred moral principles, as the "totality of beliefs and sentiments common to the average member of a society,"⁹³ are the foundation of social integration, without which society cannot exist. The form and content of these moral principles may undergo transformation from one system to another, but their religious or sacred nature is unchanging. For Durkheim, society as a conscious social being requires the creation of religion. Religion is a symbol of society and society in turn produces its own sacred symbols. These sacred social principles can appear in terms of community religion or traditional and supernatural religion. Of course, both traditional and modern religions are marked by different degrees of sacredness, and the severity of punishment should be understood in light of the relevant degree of sacredness. Godly religions are more sacred, and as they are functional in creating social integration, these give rise to harsh punishment. Such religions stimulate passionate social sentiments, and the more expiatory character of punishment serves to counterbalance these emotions of hostility against criminals.

The present thesis is a theoretical, analytic and comparative sociological study endeavouring to explore Durkheim's cultural and sociological theory of punishment, in particular his theory of religion, society and punishment, with specific analysis of its relevance to penal practice in modern societies (chapter two). This followed by an exploration through general trends in the social study of punishment in modern societies,

93 Durkheim 1984, p. 38-39

concentrating on the work of Foucault, Weber, Elias and others, to gain a wider understanding of punishment in modern societies, to develop a theoretical framework for further investigation, and to illuminate those aspects of punishment not discussed by Durkheim (chapter three). In one sense the various theories can be considered as an account of the various stages and shapes that punishment has taken in different stages of social development. Punishment graduated from the abolition of traditional and religious forms of punishment, such as torture and execution, to milder forms during civilisational processes, to the establishment of prison as a general model of penal practice in the early 19th century. Punishment was transformed through the rationalization of penal practice, the process of bureaucratisation of imprisonment systems, the emergence of therapeutic and rehabilitative ideals in the early 20th century and lately to more complicated, technological and disciplinary forms of punishment. Most recently, however, a return to a more repressive style of criminal justice areas is being witnessed in some countries.

Then, current investigation will attempt to test the cultural and emotional aspects of punishment and illuminate the role of religion through scrutiny of the Iranian and American systems of criminal justice(chapters four and five). During the last thirty years punishment in both societies has undergone profound changes, and the relationship between the transformation of social structures and penal practice need to be addressed. The approach developed in the two case studies of Iran and the USA seeks to develop Durkheim's communicative and expressive theory of penal sanctions . As Durkheim argues, "punishment is a fundamentally irrational, passionate and vengeful response to

serious violations of the [sacred] collective consciousness.”⁹⁴ There will be specific analysis of religion and it’s relevance to penal practice in modern society.

It should be pointed out that Durkheim’s theory has some limitations, in particular the description of the role of the state in society. For Durkheim, collective consciousness as a corner stone of society simply exists and actively functions in society. Punishment merely reflects and reaffirms values that already exist in society, and the state simply reveals the will of ‘the people’. This idealistic conception of the state as a representative of collective consciousness prevents Durkheim from introducing notions of political power and social conflict, or evaluating how political elites and politicians apply punishment as an instrument for their political purposes. Despite his neglect of political, technical, professional and organizational aspects of penal practice, the insights offered by his dramatic, communicative, expressive theory of punishment cannot be ignored or abandoned. Durkheim’s’ notions of the sacredness and morality can play a key role in understanding the processes and manifestations of penal practice.

94 Jushua 2004, P. 360

Chapter II Durkheim's Theory of Society and Punishment

Introduction

Durkheim's theory of society is a controversial subject. It has been described as; functionalist,¹ positivist,² rationalist,³ nominalist,⁴ realist,⁵ voluntarist,⁶ idealist⁷, moralist⁸, rhetoricist, sophist and futurist,⁹ individualist,¹⁰ constructionist,¹¹ evolutionist,¹² and anti-individualist.¹³ Durkheim himself has been described both as the founder of modern empirical sociology,¹⁴ and as a metaphysician, irrationalist, and dogmatic atheist.¹⁵ Although a comprehensive study of Durkheim's ideas is not the concern of this thesis, it is worth saying something, by way of introduction, about the different terms used to describe Durkheim's theory.

(1) Durkheim's style and his metaphorical language are polemical, and it is claimed, "tended to betray Durkheim into misrepresenting his own ideas, and into

¹ Janssen 1997, p. 294

² Merton 1999, p. 200

³ Mestrovic 1987 p. 567

⁴ Ashworth Nye 1971, p. 133

⁵ Ibid.

⁶ Gohcn 1975, p. 104

⁷ Parsons 1949, p. 468

⁸ Dubeski 2001, p. 1

⁹ Cormic 1996, pp. 85-88

¹⁰ Morske 1987, p. 1

¹¹ Fisher Kyum 1998, p. 1

¹² Garland 1993, p. 48

¹³ Merton Ibid

¹⁴ Giddens 1995, p. 1

¹⁵ Lukes 1973, p. 3

misleading himself and his readers."¹⁶ This style appeared throughout his work. For example, he used key terms like collective, religious and social forces not only as analogies of natural forces, but also saw them as operating in the same way, as if there was no difference between them. He does not provide a clear definition or a distinctive explanation for these very general terms. For him, however, these forces are real and work like physical and electrical forces on individuals in every society.

(2) Durkheim's writings are translated, and since the different concepts have different connotations in variant times and places, there is not consensus as to these meanings. For example "*solidarite*" has been translated as "solidarity," despite the fact, "the cognates are not exact equivalents. The English word has, at least in its current usage, more of an ethical connotation than the French term had at the time Durkheim employed it."¹⁷

(3) Durkheim's theory is scattered throughout his writings and each constitutes part of his theory. His ideas developed over the course of time, and "like most creative thinkers, Durkheim does not present his theories fully formed in his earliest writings."¹⁸ In short, considering his writings independently gives rise to different understandings of his theory. For example, religion in his early works is considered as a mere social fact and a social institution amongst others, while in his final work, religion is employed in the wide sense of being equal with society itself and as the "womb of human civilization."¹⁹

¹⁶ Ibid., P. 34 See also Hamilton 1996, P. 338

¹⁷ Alpert 1996, P. 28

¹⁸ Cotterrell 1999, P. 49

¹⁹ Hamilton, op. cit

(4) Durkheim was not concerned with definition or precise clarification of terms that are used in his work. For example, it is not clear whether terms like collective consciousness; representation collective, and collective sentiments are identical.⁵⁴ Moreover, there is a lack of specificity in the use of words, and terms are used interchangeably, for example, "social institutions" instead of "social facts."²⁰

(5) Some commentators have attempted to examine Durkheim's theory in light of their own intentions and assumptions. For instance, Parson considers Durkheim as "voluntarist" and "idealist" but his "interpretation often seems as much a function of his own perspectives as Durkheim's."²¹

Notwithstanding these points, "Durkheim did more than any one else to develop a sociological account of punishment and to emphasize the social importance of penal institutions."²² Durkheim's theory of punishment is an account of the social values and functions of punishment. As such, Durkheim's theory deserves consideration in analysing penal practices. Society is the cause and effect of punishment; it is the source of punishment and can be protected by penal practice. In his view punishment is located at the heart of society. It is the sanction of moral rules, as ties of social solidarity, which are the main concern of Durkheim's theory of society. Morality for him is not separate from culture, because culture in Durkheim's terms is considered as those social sensibilities and mentalities which are related to social behaviour. For Durkheim, there

⁵⁴ conscience collective or commune, as the set of beliefs and sentiments common to average members of society which forms a determinate system that has its own life is translated as collective conscience, collective consciousness (Lukes p.4) I use collective consciousness throughout my work

²⁰ Durkheim 1966, p. IVI

²¹ Pope 1973, p. 399

²² Garland Op. cit, p. 23

are correlations between variations in severity of punishment and transformations in culture. Every change in the content of collective consciousness is reflected by a revolution in the nature of punishment. His historical study of punishment is rich from this point of view, and contains many potential insights which can be further developed. The richness of Durkheim's sociological, cultural, and moral studies -and in particular the place of religion- theory and their relations with punishment can still provide a positive contribution to the study of punishment in modern societies.

More generally, Durkheim has long been recognized as a founding father of the sociological study of law, and law is a key element of his theory of society, because he achieved the most fundamental sociological knowledge about the nature of society through the study of law. For him law is an index of society and different social types can be recognized through different sorts of law. Laws are symbolic forms of societies, and are the only way in which invisible social phenomena can and should be studied. Law may be considered as a "by-product of his theory,"²³ as, or a "central part of his study"²⁴, but it is undeniable that law holds a crucial position in his sociological explorations. Thus, study of law, as a general discussion can be insightful in study of punishment, because his social analysis of law in general can more strongly be applied in penal practice area as the main sphere of my investigation.

This chapter is structured in three sections. The first is an examination of the role of punishment in social solidarity, which was a central concern of Durkheim's scientific

²³ Garland 1993, p. 12

²⁴ Cotterrell Op. cit, p. xi

life. The second is an analysis of how Durkheim studied morality as an integral part of his theory of society. This will be followed by discussion of Durkheim's theory of religion as a mysterious symbol of society. These apparently separate theses overlap in the most common and essential elements of Durkheim's thought. Finally, despite all the criticisms that have been made of Durkheim's theory, I shall endeavour to illustrate how his assumptions shape my study of punishment.

I-Social Solidarity

"Our ordinary language experiences no difficulty in using society as a collective noun requiring only a singular verb. This linguistic fact reflects the feeling of oneness or togetherness which the term suggests."²⁵ Durkheim perceived society as a unit. Society for him is not simply the aggregation of individuals living in a common place, although it would be nothing if it were not a plurality and juxtaposition of individuals. Society, according to Durkheim, is a system of interaction, which is an objective entity that has independent being. For him, the characteristics of a society are different from the sum of the characteristics of individuals. To illustrate Durkheim's holistic idea of society requires investigation of the crucial position of social solidarity in his theoretical framework. In this section, I shall explain how Durkheim studied social solidarity. This is followed by a discussion of relationship between social solidarity, the origins of punishment and its function in modern society.

Durkheim's first lecture-course in 1887-8 was entitled *Social Solidarity*. In it he set out the argument of what was to become *The Division of Labour*. As Lukes argues:

The general problem on which he [Durkheim] embarked in this first course was nothing less than the nature of social solidarity itself: What are the bonds which unite men one with another? This indeed was the problem that remained central to the whole of Durkheim's life work.²⁶

²⁵ Alpert 1990, p. 28

²⁶ Lukes 1973, pp. 138-139

Solidarity, for Durkheim, is the source of social life and, as such, is placed at the centre of his sociological studies. For the same reason morality as the ground of social integrity has been a key point in his writings, from his major early work *The Division of Labour in Society* to his major later work *The Elementary Forms Of Religious Life*. Social solidarity constitutes the fundamental structure which he established as the basis of all his later works. It can be considered as a kind of grounding on which other hypotheses are drawn. He frequently returned to the question of solidarity in various ways and expressions. If one considers his early major work as establishing a framework for his later writings, "his subsequent works are certainly far more than a mere gloss upon the conclusions reached in *The Division Of Labour*.²⁷" As will be discussed in the following section, *Durkheim on religion*, he found in religion a new foundation on which sociological conceptions such as morality, collective consciousness and social solidarity could be studied. He acknowledged this re-orientation "marked a dividing line in the development of my thought."²⁸ For him, thereafter, religion became the base of morality, solidarity and society itself. Indeed, analysis of religion as a symbol of society is the zenith of his developmental theory of society. This aspect of Durkheim's theory, however, is constantly overlooked. The sociological analysis of the role of religious perspective in forming and transformation of penal practice is crucial part of this investigation. I will frequently refer to this approach in this chapter and chapters four, five and six.

²⁷ Giddens 1972, p. 12

²⁸ S. Lukes 1973, p. 237

His main project was to study the dichotomy of individual character and universal solidarity. As he pointed out in *The Division of Labour in Society* the central question is: why, while individuals are becoming more autonomous, they simultaneously more closely depend upon society? "For it is indisputable that these two movements, social differentiation and social integration, however contradictory they appear to be, are carried on in tandem. Such is the nature of the problem that we have set ourselves".²⁹ The nature of the social bonds, beliefs, and sentiments which resolve this contradiction and give rise to unity in society are the main subject of his work.

In *The Division of Labour*, Durkheim attempts to trace the historical development of how traditional forms of social solidarity, in which the individual is attached to "his family, to his native heath, to the traditions that the past has bequeathed him, to the collective practices of the group"³⁰ have loosened, and how the division of labour produces a new form of solidarity. He analyses social changes in industrial societies in terms of two kinds of solidarity: *mechanical* and *organic* solidarity.

How does he study and classify social solidarity? Durkheim considered himself the founder of the "science of morality and scientific sociology."³¹ He argued that, methodologically there are no differences between natural and social science. In spite of differences in subject-matter, he believed the discipline could pursue the same method of research as social life possesses the power of embodiment and that "collective habits find

²⁹ Durkheim 1984, p. xxx

³⁰ Ibid., p. 333

³¹ Ibid., p. xxv

expression in definite forms; legal rules, moral regulations, popular proverbs, social conventions, etc."³² Accordingly, through those specific materialised forms, social phenomena could be studied as natural phenomena.

Durkheim attempted to distinguish the nature of social cohesion experimentally through these definite forms, in terms of cause and effect. Studying causes through effects and imperceptible facts through visible symbols is recognised as the method crucial to his sociology. Like natural scientists, he observed social phenomena through their objective symbols. As he argued;

Science studies heat through the variations in volume that changes in temperature cause in bodies, electricity through its physical and chemical effects, and forces through movement. Why should social solidarity prove an exception?³³

Durkheim illustrates this methodology in *The Rules Of Sociological Method*³⁴. In that work he argued that;

the degree of objectivity of a sense perception is proportionate to the degree of stability of this object; for objectivity depends upon the existence of a consistent and identical point of reference to which the representation can be referred.³⁵

³² Durkheim 1966, p. 45

³³ Lukes and Scull, p. 35

³⁴ Durkheim 1966, p. 45

³⁵ Durkheim 1966, pp. 44-45

Developing this argument Durkheim used the term "crystallization", arguing that social solidarity possesses the potential of crystallization and objectification without transformation of its characteristics.

Visible symbols, crystallized symbols, and effects, for him, are not different from each other, but are various statements of the same meaning, and legal rules are the only instance that he cited as both crystallized symbols and effects of society. In *The Division of Labour in Society* he argues that social cohesiveness, as a wholly moral phenomenon, is not itself open to precise scrutiny and, as a result, is not appropriate for measurement for the purpose of comparison and classification. Instead we must replace this inner conception,

which escapes us,[with] an external one which symbolises it, and then study the former through the latter. This visible symbol is the law. Indeed where social solidarity exists, in spite of its non-material nature, it does not remain in a state of pure potentiality, but shows its presence through perceptible effects."³⁶

This scientific approach led Durkheim to seek a new criterion for the classification of legal rules. For him, customary classifications of law, which divided legal rules into public and private law, were not valid because there is no affiliation between this classification, social solidarity and social changes. Instead it was appropriate to classify legal rules according to the dissimilar "sanctions" that are attached to them.

³⁶ Durkheim 1984, P. 24

He argued that: "every legal precept may be defined as a rule of behaviour to which sanctions apply. Moreover, it is clear that sanctions change according to the degree of seriousness attached to the precepts and the place they occupy in society."³⁷

He concluded that "legal rules must be divided into two main species, according to whether they relate to the repressive, organized sanctions, or to ones that are purely restitutory."³⁸ The first group, the violation of which involves expiatory consequences; is well known as penal law; the second group that have merely reparative consequences, includes civil law and commercial law. With this in mind, it is now appropriate to move on to examine Durkheim's classifications of social solidarity, and the modes of law to which they correspond. According to Durkheim, every kind of social solidarity corresponds to a particular type of legal rule. The main subject matter in *The Division of Labour* is the drawing of a sharp contrast between two types of social integration, mechanical and organic solidarity.

I-1 Solidarity and forms of law

A better understanding of the bond of social solidarity to which penal law corresponds, for me, requires assessment of Durkheim's perspective on the nature of crime and the source of punishment. He studied punishment and crime inductively in different types of societies, from primitive societies like Australian aborigines, to more

³⁷ Ibid

³⁸ Ibid., p. 28

civilised European societies.³⁹ As an initial question he asked: what are the essential, permanent, and general elements of all crimes? Although there is a minority of acts that are universally considered as a crime, the vast majority of crimes and punishments are variable according to time and place. This signifies that acts are not inherently and intrinsically criminal. This idea finds parallel in the labelling theory of crime, in which deviance is not intrinsically criminal, but is the outcome of how individuals or their behaviour are labelled. As has been argued, "[t]he variations in repressive law at the same time prove that this unchanging character is not to be found in the intrinsic properties of acts imposed or prohibited by penal rules, because they display so great a diversity."⁴⁰

Thus Durkheim holds, the permanent nature of crime should be sought elsewhere, in the relationships that crimes have with circumstances beyond their intrinsic character. According to Durkheim these relationships do not demonstrate an antagonism between crimes and social interests, because there are a "whole host of acts which have been, and still are, regarded as criminal, without in themselves being harmful to society."⁴¹ Even where crime is harmful to society there is not necessarily any proportionality between the harm and the punishment. Equally, he was not concerned with whether or not this social reaction is rational. He was not willing to attribute any specific end to the social reactions brought about by the criminal act, because these purposes are infinitely variable. He was looking for the consistent and intrinsic nature of these social responses.

³⁹ Durkheim *Ibid*, pp. 89-90

⁴⁰ Lukes and Scull 1983, p. 40

⁴¹ *Ibid.*, p. 40

He pursued the study of penal practice through proposing the question: why is the codification of penal law different from legislation in civil law? In civil law the legislature firstly expresses the duties and then states the sanctions, while penal law just says "This is the punishment"⁴² without any expression of obligations. For him there is only one reason for this divergence: "it is because the rule (duty) is known and accepted by everybody."⁴³ These judgments are already present in society. They are the rules and standards of the community. Penal laws are customary laws that have been officially confirmed, because a custom is ambiguous and can give rise to uncertainty and tension.

However, how are those rules already known and from where are they derived? For Durkheim these rules exist because they are recognized through an injury done to sacred collective consciousness or collective sentiments. The humiliation of sacred being is the permanent nature of crime. But, if so, what is the distinction between crimes and immoral acts which violate the collective consciousness but are not crimes? For Durkheim, the former sentiments have a certain degree of intensity and are deeply written upon the conscience of every individual; there is no such intensity for the latter. As a result of this analysis he arrives at the following definition: "an act is criminal when it offends the strong well-defined states of collective consciousness."⁴⁴ Therefore:

⁴² Ibid p. 43 and also see: Durkheim 1984 P. 35

⁴³ Ibid p. 44

⁴⁴ Ibid p. 47 and also see Durkheim 1984 P. 39

we must not say that an action shocks the conscience collective because it is criminal, but rather it is criminal because it shocks the conscience collective. We do not condemn it because it is crime, but it is a crime because we condemn it.⁴⁵

According to this analysis, punishment is nothing more than a passionate and emotional reaction against the violation of collective sentiments. The offender is punished because he must be punished: punish for the sake of punishing only. For this reason, punishment in primitive societies goes beyond individuals and strikes animals, instruments and innocent persons as well.

Although the aims and effects of punishment are now better understood and more organized than previously nothing substantial has changed. As has been argued we try "to make the punishment fit the seriousness of crime as exactly as possible. This gradation is unnecessary if punishment is only a defence mechanism."⁴⁶ Moreover, according to Durkheim, the shame and stigma that attached to most punishments demonstrates that there cannot be any other purpose for punishment except emotional reaction; "[t]hus the nature of punishment has remained essentially unchanged. All that can be said is the necessity for vengeance is better directed nowadays than in the past."⁴⁷

Durkheim's purpose in constructing this argument is to clarify how communal ideas and attitudes, as the basis of social solidarity, are the source of punishment. Thus

⁴⁵ Giddens 1995, p. 123-124

⁴⁶ Ibid. p. 46

⁴⁷ Ibid. p. 48 and see also Durkheim 1984, p. 63

"Every strong state of the collective consciousness is a source of life."⁴⁸ It is these common sentiments and ideas that hold individuals together.

The ideas and sentiments constituting the individual's conscience (consciousness) are, for Durkheim, real forces which enfeeble one another when they differ yet, when similar to those of others reinforce each other and fuse to produce new forces.⁴⁹

In other words, similar sentiments attract and strengthen one another, whilst opposite sentiments repel and weaken one another. When a crime offends similar sentiments, the threat increases their force of attraction. For Durkheim, all that tends to weaken this communal sentiment depresses us. This state is not merely an image of reality; "It is rather a (real) force, which stirs up around us a whole whirlwind of organic and psychological phenomena."⁵⁰

Crime implies that these sentiments are not absolutely collective, and thus damages that unanimity which is the source of their authority. Society suffers and is dishonoured through disregard of its moral grounds; this requires a remedy. Thus expiation as an emotional response is necessary to recover the authority that has been disturbed. It is not that everybody is attacked individually, and not just a general reaction rather it is something collective. It is,

⁴⁸ Ibid P. 53

⁴⁹ Takla and Pape 1985, pp. 74-88

⁵⁰ Durkheim 1984, p. 53

vengeance for something *sacred* which we vaguely feel is more or less outside and above us...since these sentiments are collective, it is not us that they represent in us, but society. Thus by taking vengeance for them it is indeed society and not ourselves that we are avenging.⁵¹

This statement and statements like it in *The Division of labour* show Durkheim developing his idea of sacred nature of society, but this idea is less well-developed than in later stages of his social theory. He believed that the collective consciousness in primitive societies was religious in character. As a result, social reaction was often harsh in such societies. Deeper investigations into the nature of society, however, told him that there was no significant difference between traditional and modern societies in this regard. As we shall see later in this chapter, Durkheim eventually theorised religion as the base for society; without which the nature of social being could not be understood.

The offender, then, should be subjected to suffering and humiliation as a reaction to his or her behaviour. This reaction restores social and moral health to society and re-establishes social cohesion. It is the collective consciousness that is wounded, and it is this common consciousness that resists; as a result, the response must be collective. The severity of this reaction depends on the strength of the feelings that are wounded, and the gravity of the offence committed. These sentiments are stronger the more unquestionable and common to everyone.

⁵¹ Durkheim *Ibid.*, p. 56

The major function of punishment, therefore, is that of strengthening and reaffirming the collective consciousness in the face of acts which question its authority and sacredness. In primitive societies,

there is a unitary religious system which is the prime embodiment of common beliefs and collective sentiments. Religion comprises all, extends to all, and contains an intermingled set of beliefs and practices regulating not only strongly religious phenomena, but also ethics, law, the principles of political organization.⁵²

Since all penal laws are originally religious in character, in the most primitive forms of society all laws are repressive. Drawing on his earlier definition of crimes, Durkheim concludes that the rules sanctioned by punishment are the expression of the most essential social sentiments.

In primitive societies penal law represents, affirms and reproduces the solidarity of likenesses. The kind of solidarity that has been brought about by similarities Durkheim calls *mechanical solidarity*.⁵³ What finally rationalizes the employment of this term is the truth that the tie that thus links the individual to society corresponds to that which associates things to the person: "the individual consciousness ... is simply a dependency

⁵² Giddens 1975, p. 76

⁵³ As Giddens said, according to Durkheim in primitive societies, every individual is a microcosm of the collective type. Ibid p. 6

of collective type, and follows all its motions, just as the object possessed follows those which its owner imposes upon it."⁵⁴

This fundamental resemblance is the base of social life and maintains social cohesion. In this kind of society strong elements of tradition and religion cover most of the individual spheres. As such, individuals should resemble one another in terms of their communal beliefs. There is less space for individual divergence. Individuals and their personality are absorbed in collective consciousness. Deviant activities cannot be tolerated, as they offend common sentiments, causing an emotional and punitive response. This solidarity is more intelligible when contrasted with other solidarity that Durkheim identifies: *organic solidarity*.

Social transformation in the course of social development is, for Durkheim, a fundamental change in the foundation of social solidarity. Indeed, for him, the social transformation from primitive to modern society is nothing less than a change in the very nature of solidarity, from *mechanical solidarity* to *organic solidarity*. His theory of social change is based on the inter-relationship between individual and society in general, and the reconciling of individual freedom and social order in particular. The most important factor in studying the displacement of mechanical solidarity by the new form of social solidarity is the division of labour. Durkheim considers the increasing division of labour to be the source of modernization. He believed that the dynamic of density and quantity

⁵⁴ Ibid. pp. 84, 85

of population unavoidably leading to professionalization and the division of labour in modern societies.

*"The division of labour varies in direct proportion to the volume and density of societies and if it progresses in a continuous manner over the course of social development it is because societies become regularly denser and generally voluminous"*⁵⁵.

For Durkheim, these material factors are accompanied by moral and cultural factors. There is a transformation of the content of common principles from that which is restricted and tangible to the general and abstract, and the process of individualization provides individuals with more autonomy. Moreover, as the content of the collective consciousness is transformed and individuals become less dependent, that domination of tradition declines and rationality increases in the area of morality and law.

As differentiation of functions proceeds, the number of rules or norms in society increases, but they relate only to their specialized sphere and so they carry less weight in society and can more easily allow for innovation. In order to become more general they must become more abstract and this in turn leaves more space for individual divergences.⁵⁶

⁵⁵ Ibid., p. 205 (Emphasis is original)

⁵⁶ Thompson 1982, p. 84 See also Durkheim 1984 p. 303

As a consequence, the conditions of society alter profoundly. If in mechanical solidarity individuals resemble one another, in organic solidarity they are different from one another. If the previous condition required that individual personality be absorbed in the collective consciousness, the new condition provides free space for individual activity. Here the collective consciousness does not cover all individual spheres. For Durkheim, the solidarity that the new situation gives rise to resembles "that observed in higher animals, in fact each organ has its own special characteristics and autonomy, yet the greater the unity of organism, the more marked the individualisation of the parts."⁵⁷ For that reason he calls this form of solidarity, brought about by the division of labour, *organic solidarity*.

The most important symbol of the new condition of society is the presence of restitutive law. For Durkheim, "the very nature of the restitutory sanction is sufficient to show that the social solidarity to which that law corresponds is of a completely different kind."⁵⁸ What distinguishes this sanction from the repressive is its reparative nature. Rather than being expiatory, it simply consists of restoring a prior state of affairs. The wrongdoer does not suffer from being wounded or deprived of his liberty. In short, the law says nothing about punishment. Although this sort of law regulates relations between individuals rather than with society, society is not entirely absent. Society has to "intervene more or less directly and actively,"⁵⁹ according to its interests. Society is still present through the involvement of particular institutions.

⁵⁷ Ibid., p. 85

⁵⁸ Ibid., p. 86

⁵⁹ Giddens 1995, p. 137

What is clear is that the relationships which are established by penal law are different from those regulated by restitutory law. There is not relation between individual and collective sentiments and they do not provoke the same level social and emotional reaction. Therefore, there is no need to resort to penal sanctions: "in general, co-operative relations do not convey other sanctions."⁶⁰ This does not mean that the bonds of social solidarity, whose breach gives rise to a repressive response, are totally absent. In Durkheim's terms while the extent and scope of repressive law in traditional society is greater, because the source of social solidarity in these kinds of society is likeness, in modern society the volume of punitive law has become smaller and restitutory law envelops more social affairs. This is because, in the second case, it is a system of specialised and distinctive functions that is the source of social solidarity. The Division of labour enhances individualization; it also creates an organic solidarity, based on interdependence of co-operative individuals and groups. It is a social integration based on functional interdependence of specialised individuals and groups. Indeed, there are two kinds of solidarity; group solidarity and social solidarity that -in conflicts between two it would be resolved in favour of communal solidarity.

In modern industrial societies, labour is vastly divided. Individuals no longer carry out the same tasks, have identical interests, nor share the same essential perspectives on life. However, Durkheim holds that this does not immediately give rise to social disintegration. From Durkheim's point of view, development of the division of

⁶⁰ Ibid., p. 138

labour is coupled with a growing level of contact between individuals as traditional structures vanish. The more the division of labour progresses, the more individuals have mutually to act and react upon one another. As has been mentioned, for Durkheim there is a kind of connection between the dynamics of moral and physical density. Increasing physical contact and mutual needs produce a form of moral relationship. Individuals are dependent on each other to perform economic functions that they themselves cannot perform. As such, the division of labour performs a key role in ensuring interdependence and in developing of new forms of social ties. As a result of the formation of cities, the development of transportation and communication, and the increased density of population, social and moral contact increase. These conditions lead to the new form of social solidarity in modern societies. This type of solidarity is embodied by legal rules defining the nature and relations of functions. These rules Durkheim terms *restitutive law*, because their infringement entails simply reparative, and not expiatory results. It should be mentioned that repressive law is still current in modern society, although "these consequences are exceptional"⁶¹ in comparison with traditional societies.

Thus, Durkheim recognized only two kinds of solidarity. In the first, society is a totality of beliefs and sentiments common to all members of group: "it is a collective type. By contrast, the society to which we are bound in the second instance is a system of differentiated and specialised functions, which are united, in definite relations."⁶² While in mechanical solidarity there is more similarity, less free space for the individual, and

⁶¹ Durkheim 1984, P. 83

⁶² Giddens, Op. cit, P. 138

solidarity is stronger, in organic solidarity, on the contrary, the greater differences, specialized functions and free space for the individual gives rise to the stronger solidarity.

The former is best evident among primitive societies where a "mechanical solidarity" evidenced by repressive law prevails; the latter in advanced societies where populations evidence greater "dynamic density", and juridical rules define the nature and relations of functions.⁶³

Durkheim does not imply that collective consciousness in modern societies is completely eradicated, but that it emerges in the form of new moral ideals: "The values and beliefs composing moral individualism [stress] ...the dignity and worth of the human individual."⁶⁴ This is what Durkheim has called 'the cult of the individual'.

As with Durkheim's general sociology, his sociology of law has faced a number of important challenges. His classification of law into *repressive law* and *restitutory law* has been criticized from two angles; its lack of comprehensiveness and its correspondence with the reality of societies and historical evidence. In relation to the latter criticism it has been argued that Durkheim's theory of social evolution and transformation of law is overly simplistic and unilinear and that ethnographic records do not validate his account of the historical evolution of law. Durkheim took his evidence on legal order from classical antiquity and early Europe- and it could be argued that it is solely these epochs that support Durkheim's theory. A number of scholars have,

⁶³ Merton 1994, p. 17

⁶⁴ Giddens 1973, p. 7

however, argued exactly the opposite: the "Torah basically embodied religious and moral exhortations devoid of punitive backing, and existed alongside a legal system distinct from religious affairs and evoking restitution for secular offences."⁶⁵ And, as Sir Henry Sumner Maine (an authority on whom Durkheim himself relied) has argued, in ancient communities "repressive, vengeful action on behalf of the community was only taken in exceptional and serious cases."⁶⁶ The law of ancient communities was not law of crimes but law of wrongs; what is termed Tort in the English legal system.

Therefore, it is argued that Durkheim's evolutionary hypothesis not only cannot be proven by historical evidence but that the evidence seems sometimes directly to contradict Durkheim's thesis. At the very least, it is clear that in his periodization Durkheim "overstates the importance of 'repressive' law in early societies and understates its role in advanced ones."⁶⁷ This criticism becomes stronger when one considers that Durkheim did not recognize any intermediate stage between the two stages of law and society, as if there are only two stages in the evolution of law. Both criticisms imply that Durkheim's classification of law into repressive and restitutory law cannot be exhaustive. It may be necessary to recognize "a third class of 'mixed sanctions' combining elements of punishment and restitution.... regulatory law might well be considered to create a form of responsibility identified by mixed sanctions."⁶⁸ It can be

⁶⁵ Lukes and Scull 1983, p. 11

⁶⁶ Ibid p. 11

⁶⁷ Garland 1990a, p. 48

⁶⁸ Cotterrell 1999, p. 70

said that , "he fail[ed] to note that repressive and restitutive sanctions may often be mixed".⁶⁹

However, Durkheim did not claim to have carried out a comprehensive historical study of punishment. His analysis is "functional rather than historical."⁷⁰ His argument focused on two social types and their relation to law. He discusses two kinds of solidarity -mechanical and organic- and how these kinds of solidarity give rise to different forms of penal practices. As he himself stated, "we have only to classify the different types of law in order to be able to investigate which species of social solidarity correspond to them."⁷¹ His sociological and empirical study of legal forms led him to identify two kinds of common sanctions: 'repressive' and 'restitutive'. These categories are not mutually exclusive, and the criticisms do not, therefore, undermine Durkheim's functional theory or his ideas about the features of repressive and restitutive law. Moreover, inadequacy of historical evidence does not damage the essence of his theory of the relationship between, culture, sacred, religion on the one hand and punishment on the other hand.

Durkheim's theory has also been criticised for ignoring the role of political institutions and lawmaking procedure. It is contended that he does not recognize an independent role for politicians and political issues as a whole and "ignored the intentions or skill of the law creator."⁷² Likewise it has been claimed that he does not take the role of interest groups in society seriously and simply discusses a 'collective consciousness.'

⁶⁹ Ibid., p. 33

⁷⁰ Garland Op. cit, p. 49

⁷¹ Lukes and Scull Op. cit, p. 37

⁷² Cotterrell Op. cit, p. 33

For example, Garland argues that society is also - crucially made up of competing social movements and groups; we should perhaps talk of a 'ruling morality', or a 'dominant moral order', rather than collective sentiments.⁷³ It may be true that Durkheim does not fully discuss the role of various interest groups, but nonetheless he was aware that in industrial societies, individuals no longer have the same interests, nor share the same perspectives. However, this does not mean that there is no collective consciousness, rather that there is a social solidarity based on functional dependence of professionals, individuals and groups. Durkheim states that by the collective consciousness he means those ideas and beliefs that are accepted by the majority of individuals in a society. Thus, there is no significant difference between what is termed a dominant moral order and the collective consciousness.

It should be added that, beside mechanical and organic solidarity, Durkheim recognized another social condition that is different from both although it cannot be classified as third kind of social solidarity. It is an exceptional and temporary situation in occurring in the course of social development. He calls this condition anomie.

I-2 Social Anomie

Durkheim's formulation of social transformation in terms of mechanical and organic solidarity, based on likeness and the division of labour, is problematised by socio-economic crises in modern societies, in which a kind of relative normlessness is

⁷³ Garland, Op. cit, p. 52

visible in the of whole society or some of its component sections. If norms and moralities derived from division of labour lead to new forms of social integration, then how can such states of affairs be explained? Durkheim tried to solve this problem through the concept of 'anomie'. He employed this concept in his *Division of Labour*,⁷⁴ *Suicide*⁷⁵ and *Moral Education*. For him, anomie "springs from the lack of collective forces at the certain points in society; that is, of groups established for the regulation of social life."⁷⁶ For him "the state of *anomie* is impossible whenever interdependent organs are sufficiently in contact and sufficiently extensive. If they are close to each other, they are readily aware, in every situation, of the need which they have of one-another, and consequently they have an active and permanent feeling of mutual dependence."⁷⁷ Anomie is a condition of lack of regulation and breakdown of social norms.

Therefore, the trajectory of social progress for Durkheim is not a simple straightforward societal transformation from mechanical to organic solidarity and the development from traditional to modern morality is not free from disruption or crisis. A new condition for the division of labour requires a new regulatory process that "either does not exist or is not related to the degree of development of the division of labour."⁷⁸ For Durkheim, then, industrial and commercial crises or social conflict can be regarded as ramifications of unregulated relationships. Previous collective sentiments, based on

⁷⁴ Durkheim 1984, p. 292-308,339

⁷⁵ Durkheim 1915 p. 258, 285,288-9, 357,382

⁷⁶ Durkheim, *Ibid.*, p. 382

⁷⁷ Giddens 1972, p. 184, Durkheim 1984, p. 184

⁷⁸ *Ibid.*, P. 303

similarities, become more and more powerless, because functional diversity has inevitably developed and centrifugal tendencies increased, while simultaneously shared sentiments have grown weaker.

As a result of an extending market, the appearance of large-scale industry, and the specialization of functions, social relations change rapidly: "these new conditions of industrial life naturally demand new organization, but as these changes have been accomplished with extreme rapidity, the interests in conflict have not yet had the time to become equilibrated."⁷⁹ Primitive models of social structure have changed and "the morality corresponding to this type of society has lost influence, but without its successor developing quickly enough to occupy the space left vacant in our consciousness."⁸⁰ It should be noted that this anomie is not absolute, because total normlessness is not possible. It is a matter of degree, as different societies are characterised by various degrees of normative regulation. Anomie may also occur differently in different segments of a society, for example in business or the family.

Although Durkheim did not discuss punishment in anomic societies, the ramifications of his theory in such societies are more or less predictable. As discussed previously, penal practice for Durkheim is a passionate reaction against any attack on or injury of collective sentiments: the more strongly those sentiments are held, the more severe the reactions. "Common beliefs have been disturbed. Tradition has lost its way.

⁷⁹ Giddens Op. cit, p. 186

⁸⁰ Durkheim 1984, p. 339

Individual judgment has thrown off the yoke of the collective judgement."⁸¹ As a result, it can be said that the fundamental grounds of repressive law are underpinned or weakened by the growth of normlessness.

However, in anomic societies, that normlessness is neither absolute, nor is a new morality corresponding to the new conditions of society totally established. Accordingly there may be a substantial gap between official punishment and unstable social conditions. As will be discussed in Chapter 5, in such conditions there is less compatibility between present penal practice and social sentiments. Probably there is a kind of tension in society about suitable penal practices. According to Durkheim's theory, the more developed and civilized that segments of society are the greater tendency towards a milder form of punishment and vice versa.

⁸¹ Durkheim Ibid , p. .339

II-Durkheim on Morality and culture

Morality for Durkheim is not just a matter of "discipline, compounded by regularity of conduct"⁸² and a source of legal rules. Rather, morality is the subject of society itself - "the domain of morals begins where the domain of the social begins."⁸³ For him, there is a kind of interaction between morality and society; while society is regarded as a source of morality, moral rules are the foundation of social solidarity. The object of this section is to investigate the exact meaning of culture in Durkheim's theory of society. I will start by examining the position of morality in Durkheim's thought and its relation to society. This is followed by a brief discussion of the aims of moral action and, finally, a discussion of the essential elements of Durkheim's thought - collective consciousness and collective representations- and their relation with morality and culture.

Durkheim started his major early work with the study of moral life. In the preface to the first edition of *The Division of Labour* he wrote: "This book is above all an attempt to treat the facts of moral life according to methods of positive science."⁸⁴ As Lukes has argued, "Durkheim never ceased to think about morality."⁸⁵ Morality has always been the "centre and end,"⁸⁶ of his sociological investigations. He always conceived his contributions to sociology as being primarily focused within the more specialised field of the sociology of moral facts. He believed he had discovered in society "the end and the

82 Durkheim 1973, p. xi

83 Ibid., p. xii

84 Durkheim 1984, P. xxv

85 Lukes 1973, p. 411

86 Ibid., p. 419

source of morality.”⁸⁷ Indeed, it can be said that the “ ‘Moral’ is often synonymous with ‘social’ in Durkheim’s work.”⁸⁸ Furthermore, moral rules, for him, are the spirit of social order and provide the ties of social solidarity. The durability of moral ideas and moral rules of behaviour are inseparable elements of his sociology. Of course, the nature of these ideas and codes of conduct changes alongside the evolution from mechanical to organic solidarity, but the moral quality of society is beyond doubt. Society has been and always will be under the constraints of morality, because it forms a crucial part of the very nature of society without which it cannot exist. However, Durkheim goes much further to insist that “Moral constraint is the very essence of collective life; society and morality are the one.”⁸⁹

If, as Durkheim claimed, morals is the aim and origin of society and morality and society are one, then how can one explain the relations between moral action and society? What can be the aim and end of moral action? In other words, if morality is a “comprehensive system of prohibitions”,⁹⁰ what end is served by these limitations? For him, moral behaviour cannot be directed to personal ends or motivated by egoistic sentiments because these actions have no moral value. By the same token it follows that the sum of individuals have no more value than those of individual persons. If self-interest has no moral value, the collective interest in so far as it is the sum of self-interest is amoral as well. Quantity does not solve the problem. As Durkheim argued in *Moral*

Education:

87 Lukes 1973, p. 417

88 Shilling and Mellor 1998, p. 196

89 Marske 1987, p. 2

90 Durkheim 1973, p. xi

"If society is to be considered as a normal goal of moral conduct, then it must be possible to see in it something other than a sum of individuals; it must constitute a being *sui generis*, which has its own special character distinct from that of its members and its own individuality which is different from that of its constituent individuals. In a word, there must exist, in the full meaning of the word, a social being."⁹¹

Thus, denying any utilitarian object for moral conduct and any egoistic sentiments as a motivation for moral behaviour, he insists that "an action is moral if and only if it is aimed at a social end or object. More specifically, it should be aimed at securing the common good,"⁹² and finally that "an action is moral if and only if it is socially prescribed and/or in accordance with society's ideals and values."⁹³

Durkheim is often called a "social constructionist."⁹⁴ One of his most important concerns is the origin of human society and how that society is constructed. In his final major work, *The Elementary Forms of Society*, he argued that the most essential factor in the creation and re-creation of human society was emotion. The coming or being together of a "certain number of men participating in the same"⁹⁵ rites, ceremonies and life give rise to emotions which transform the ordinary life of the individual, and they feel they have been elevated above themselves. In this new experience the individual is encircled by transcendent and holy feelings. These sentiments are engraved on symbols

⁹¹ Durkheim 1973, p. 60

⁹² Lukes 1973, p. 417

⁹³ Ibid

⁹⁴ Fisher; Chon 1989, p. 3

⁹⁵ Durkheim 1915, p. 222

and ideas and become perpetually alive. As such, collective sentiments are created by assemblies and established permanently through symbols, ideas and common social principles. As we will see, these religious and collective forces are none other than unifying forces of a society.

For Durkheim common principles and moral rules are thus “emotionally grounded products of society.”⁹⁶ Individuals who participate in special rites feel they are dominated by sacred powers. These sacred forces are superior to individuals and have a sense of dignity and superiority. These are moral powers,

since they are made entirely from the impressions that moral collectivity as a moral being makes on other moral beings, the individuals. Such moral powers do not express the manner in which natural things affect our senses but the manner in which collective consciousness affects individual consciousnesses.⁹⁷

We should be aware that according to Durkheim any society “only lives in and by means of the individual consciousnesses of which it is made.”⁹⁸

Thus, it can be concluded that the most essential elements in his social thought are social ideas and sentiments. These sacred ideas and sentiments, which bind individuals together, are fundamental factors of social solidarity. In the *Division of Labour* the discussion of morality arrives at the conclusion that common morality “ordains that a

96 Shilling and Mellor 1998, p. 195

97 Durkheim 1915, p. 224

98 Ibid p. 222

man should be a man in every sense of the word, that is, possess all the *ideas and sentiments* that constitute a human consciousness."⁹⁹ For him it is morality that "shapes the mass of individuals in to a cohesive aggregate."¹⁰⁰ Indeed, morality is a complex of *ideas and sentiments*, of ways of seeing and feeling that give rise to social integration. He uses words like, "conscience, spirit, representation collectives, all of which refer in one way or another to the knowledge, beliefs, and values shared by members of the group."¹⁰¹ These and terms like collective consciousness, conscience collective, morality, representations collective, and collective sentiments, mark the essential elements of Durkheim's sociological thought. Indeed, it is difficult to find an argument in which these key words are not used. The following discussion is an attempt to show the content of these essential terms.

If we see culture, in Durkheim's sense, as the "totality of beliefs and sentiments common to the average members of society,"¹⁰² then, the core subject-matter of Durkheim's sociological theory would be culture. Indeed it has been argued that "Durkheim covered the same ground with his notion of conscience collective and representations collectives that such cultural anthropologists as Edward Sapir, Bronisław Malinowski, A.I. Kroeber and Robert Redfield (to name a few) did with their various developments of the idea of culture and its related concepts."¹⁰³ Likewise, "[t]he only

99 Durkheim 1984, p. 329

100 Ibid., p. 331

101 Durkheim 1973, pp Vii-Viii

102 Durkheim, 1984 p. 38-39

103 Bohman 1964 p. 77

suitable English word for this notion (Durkheim's French notion of conscience) is the anthropologist's term "culture."¹⁰⁴ Consequently, we can say that

Durkheim's main theoretical interest was in the functioning and content of the collective conscience and collective representations which encompassed much of what modern sociology calls culture, especially those aspects of culture that have an obligatory character, deviance from which brings into play sanctions typical of a society at that particular stage of development.¹⁰⁵

Durkheim's brief account of culture is far from the wide definition of culture introduced by thinkers such as David Garland. In Garland's view culture covers all sorts of mentalities and sensibilities. He employs a broad description of culture which includes cognitive phenomena identified as 'mentalities', but also emotive phenomena usually recognized as 'sensibilities'. Garland's definition "covers the whole range of mental phenomena...philosophies, sciences, theologies...folk prejudices and plain common sense. Likewise...fashion, manners...ethic, justice, and morality"¹⁰⁶ are covered by that this term. Garland takes culture in its wide ethnographic sense, that is a complex whole that includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.

Equally, Durkheim discusses the totality of ideas and sentiments as the content of collective consciousness. But Durkheim's description of culture is narrower than

¹⁰⁴ Ibid p. 78

¹⁰⁵ Thompson Kenneth 1982, p. 75

¹⁰⁶ Garland 1993, p. 195

Garland, because the term 'mentalities' from Durkheim's perspective mostly refers to those ideas that are deeply held. Indeed, ideas for him are simply another word for beliefs. In this sense Durkheim's idea of culture does not cover the cognitive aspects of culture. A generic definition of culture is simultaneously everything and nothing. At least for the present study of punishment a wide definition of culture is not helpful, because I am looking for those aspects of culture that have a kind of sacred character and their violation bring about passionate reactions. These aspects of culture are more directly related to the area of penal practice.

III- Durkheim, morality, law and punishment

Durkheim sought to uncover the moral foundations of law. He explains in relation to criminal, contract, property, succession, industrial and family law, the values that must underpin modern regulation, justifying these sociologically in terms of the role of law and its historical development. Durkheim's legal and moral questions were ultimately inseparable. This does not mean that law and morality cannot be analytically disentangled, but refers to the idea that the moral rules embodied in the conditions of social life are articulated by the law. Thus, for Durkheim, the study of law is an absolutely essential and central part of the sociological enterprise.

For Durkheim, law is an index of social solidarity expressing constitutional forms of social cohesion. Since "he tended to see law as derivative from and expressive of a society's morality,"¹⁰⁷ moral phenomena can be studied through their reflection in legal rules. For him "sociology gains its most fundamental knowledge about the nature of societies directly from law."¹⁰⁸ It is thus difficult to assume that law is peripheral to his work; rather, "for Durkheim, the study of law was an absolutely essential and central part of sociological work,"¹⁰⁹ because it not only provides a crucial means of studying society but also plays the role of expressing and protecting morality and social solidarity.

According to Durkheim, the relationship between morality and law can be studied in several ways. Firstly, the supremacy of legal rules can be understood by referring to

¹⁰⁷ Lukes and Scull 1983, p. 3

¹⁰⁸ Cotterrell *Ibid* p. 31

¹⁰⁹ *Ibid* P. ix

morality, because law derives from moral phenomena. As he argues: "law's authority, its special nature as something to be respected, must be understood as part of a broader understanding of the essence of moral phenomena."¹¹⁰ The opposite is also true because, for him, legal rules are the embodiment of moral rules. Secondly, law and morality, especially in primitive societies, are expressions of collective sentiments as the "totality of beliefs and sentiments common to the average members of society."¹¹¹ Thirdly, both law and morality consist of systems of rules of behaviour which are accompanied by sanctions. The compulsory aspects of morality are not different from legal limitations in their intrinsic character. However, legal rules are "notable for their clarity and precision, whilst purely moral rules are generally somewhat fluid in character."¹¹² Also, for Durkheim, "sanctions (of moral rules) are administered in a diffuse way by everybody without distinction, whilst those of the penal codes are applied only through the mediation of definite body- they are organized".¹¹³ Finally, legal rules can be considered as a particular way in which the sanctions of moral rules may be carried out. As a result, "the best entry into his legal theory is through his conception of relationship between law and morality."¹¹⁴

If law is considered as a crucial part of Durkheim's sociology, penal law, as the most functional part of law, should be taken to be a central object in his theoretical framework. Punishment is placed at the very heart of his theory of society because punishment for him is the symbolic and expressive reaction of the collective

¹¹⁰ Cotterrell *Ibid* p. 50

¹¹¹ Durkheim 1984, p. 38-39

¹¹² Durkheim *Ibid* p. 38

¹¹³ *Ibid.*, p. 29

¹¹⁴ Cotterrell *Op. cit.*, p. 49

consciousness and society itself. Penal practice is an expression of society's morality, and both are aimed at maintaining the integrity of the social system. The relationship between the penal code and morality, for Durkheim, is more straightforward and obvious than morality's relation with law in general because criminal law is the most functional part of law in strengthening morality and social solidarity. As has been mentioned, society for Durkheim is nothing other than common principles that constitute the basic conditions of its creation and durability. These common or moral principles form the authority of society and create a sacred domain. The common feature of crimes is that "universally they strike the moral consciousness of nations in the same way and universally produce the same consequence."¹¹⁵ This is in general a passionate reaction, although severity of response "varies greatly from one society to another."¹¹⁶

Any offence against well-defined and deeply engrained states of collective consciousness give rises to strong feelings of anger in the hearts of believers, because these collective values are perceived as exalted sacred beliefs. Every criminal act against these imprinted values diminishes their authority and is a sign of demoralization. In these conditions the essential function of punishment is that of preventing of social power from losing its authority, "which infractions, if they went unpunished, would progressively erode."¹¹⁷ Thus for Durkheim a punitive response is "an essential and necessary component of any moral order."¹¹⁸

¹¹⁵ Durkheim 1984, p. 31

¹¹⁶ Ibid p. 32

¹¹⁷ Durkheim, 1973 p. 167

¹¹⁸ Garland 1983, p. 42

However, injury done to the collective sentiments does not in every case constitute a criminal act. For this to happen, these common emotions need to be universal and have a definite degree of strength. Durkheim states: "there must be a certain average of intensity. Not only are they written upon the consciousness of everyone, but they are deeply written."¹¹⁹ The distinction between strong, intense and well-defined sentiments and other collective sentiments that do not encompass these characteristics is not free from ambiguity. In particular, it is difficult to recognize them empirically. In solving this dilemma, Durkheim resorts to specific official organizations that are charged with the defining of wrongdoing and the application of punishment. Thus, for example, "the existence of a court to condemn the offender and determine punishment"¹²⁰ could answer this question. Those social ideas and sentiments that are expressed through legislative process or sentencing procedure can be considered as strong and established collective consciousness.

Returning to our main discussion, Durkheim denies any utilitarian calculation or deterrent effect for punishment. He views the most crucial function of punishment as the reassertion of the existing moral order. Therefore punishment should be carried out in a way which conveys a moral message. For that reason "the best punishment is that which puts the blame... in the most expressive but least costly way possible."¹²¹ In Durkheim's terms the moral message of punishment is vital. Punishment without this crucial factor can be counter-productive.

¹¹⁹ Emile Durkheim 1984, p. 37

¹²⁰ Cotterrell Op. cit, p. 67

¹²¹ Durkheim, 1973 p. xvi

IV-Punishment and Culture

In the conclusion of my discussion of 'Durkheim on Morality' I argued that "Durkheim's main theoretical interest was in the functioning and content of the collective representations which encompassed much of what modern sociology calls *culture*, especially those aspects of culture that have an obligatory character."¹²² It was argued that the content of morality and collective sentiments in Durkheim's terms is very close to the notion of culture, and Durkheim's narrow description of culture is more useful than a more general definition. Durkheim's understanding of culture is more functional and analytically useful in an investigation of punishment, because it has a more obvious relationship with penal practice. Durkheim addresses those aspects of culture (sensibilities and ideas) that are crucial and deeply engrained in consciousness of individuals. He identifies and studies those parts of mentalities and sensibilities which have an obligatory character. It is from this angle that, for him, morality, religious forces, collective consciousness, social sentiments, and culture are common conceptions. These kinds of communal emotions are roots of social penal reaction.

Indeed for him the emotional aspects of culture are more crucial than the cognitive ones. In other words, a cognitive phenomenon is not intrinsically crucial until it converts to a deeply held belief which is supported by social sentiments in the case of any violation. Punishment for him is, more than anything, a passionate reaction that derives from the violation of the most respected and sensitive social subjects. It may be for this reason that Durkheim discussed social or collective sentiments more than common ideas.

¹²² Thompson 1982, p. 75

Sentiments originate from ideas and support them. Indeed, in Durkheim's account, an act is a crime when it offends strong and well-defined collective sentiments. It was for this reason that I argued that Durkheim's understanding of culture has more a direct and plain relation with punishment than other's broader definition of culture. These ideas and sentiments, for Durkheim, are the fundamental basis of society. The automatic and passionate social reactions to moral injury have been modified, graded and organized by modern penal institutions. But, for him, the essence of punitive behaviour as an expression of social sentiments has remained intact. Durkheim is fully aware that the extent and form of punishment is changeable in terms of time and space. What is stable for him is the vengeful character of punishment. "It [punishment] adapts itself to the new conditions of existence created for it without thus undergoing any essential changes."¹²³

As a result punishment, in Durkheim's account, has social implications and a profound cultural resonance. Indeed, in his account cultural patterns are deeply embodied in penal institutions. This is a crucial aspect, if not the most important feature, of the study of punishment. Durkheim has opened up unique aspects in the social process of punishment. He shifted our concerns from the professional, practical and administrative aspects of social penal practice to communal and emotional features. He does not agree with analysing penal practice as a limited industrial and technical process of crime control. Instead, he viewed punishment as an institution that operates as a symbol of both individual and social emotions. The insights offered by his discussion of sacred and sentiments that are aroused by offence and penal practice, cultural, social and

123 Lukes and Scull 1983, p. 60

moral significant of punishment are imperative to the understanding of penal practice in modern societies.

According to Durkheim there is a direct correlation between collective consciousness, and type and severity of punishment. Collective feelings are the origin of punishment and the function of penal practice is expressing, protecting, and reproducing common beliefs and sentiments. Any evolution in penal law can only be understood within this framework. Punishment in Durkheim's view is a matter of socio-emotional reaction. The severity of this reaction depends on the degree of strength and sacredness of feeling, and the gravity of the offences. Therefore, an alteration in the character of collective consciousness results in changes in the severity of penal policy. Hence, the historical transformation of punishment should be seen in terms of historical variations of the content of culture. This will be examined in more detail below.

Durkheim introduces two laws to explain the historical interaction between the alteration of collective consciousness and variations in punishment. First, "the intensity of punishment is the greater the more closely societies approximated to a less developed type and the more central power assumes an absolute character."¹²⁴ The second law states that "deprivations of liberty, and of liberty alone, varying in time according to the seriousness of the crime, tend to become more and more the normal means of social control."¹²⁵ Durkheim's first law will be discussed in two parts.

¹²⁴ Lukes and Scull 1983, p. 102

¹²⁵ Ibid p. 114

According to Durkheim's the historical development from ancient societies, through feudal times, to modern societies shows a general tendency to move from the barbaric and extreme punishments to milder forms of punishment. He endeavours to explain how punishments have become less severe as one moves from the most primitive societies to more advanced societies. He refers this question to his basic theory in asking which "punishment results from crime and expresses the manner in which it affects the public conscience."¹²⁶ For him, the collective consciousness in primitive societies is religious in character. These shared sentiments are not concerned with individuals, but are a collective entity. Criminal behaviour is considered as an attack that has been committed against transcendent beings: "a transgression is correspondingly more shocking if the offended being is superior in nature and dignity to the transgressor."¹²⁷ Even a strong pity for the offender cannot contradict "the indignation aroused by the act of sacrilege"¹²⁸ and reduce severity of punishment "because the two sentiments are too unequal."¹²⁹

However, conditions in advanced societies are no longer the same. His idea of the "cult of the individual", for example, in which the object of collective sentiments is the individuals' human dignity, explains the condition of modern societies in this regard. What has changed is the content of collective sentiments. An act, now, is criminal because it offends the human in general. For Durkheim, there are two reasons for weakening the average strength of punishment in modern societies. Firstly, the

126 Ibid., p. 122

127 Giddens 1995, p. 133

128 Ibid., p. 129

129 Ibid., p. 124

respective positions of offender and offended are approximately the same: "[t]he offence of man against man can not arouse the same resentment of offence of man against God."¹³⁰ Secondly, there is a strong feeling of pity for the offender, which serves to counterbalance the sentiments that he has offended and which react against him. These opposite sentiments are different only in degree and not in nature. Human beings and humans in general have fewer differences between them than differences between man and god. Acts of lese-divinity and acts of lese-humanity are not the same. There is sympathy for humanity and sympathy for every man who suffers punishment, and a contradiction "in avenging the offended human dignity of the victim by violating that of the criminal. The only way... is to lessen the punishment as much as possible."¹³¹ Changes in the nature of collective sentiments therefore give rise to changes in the manner in which society reacts against crime.

The second part of the first law of the evolution of punishment concerns political structure and its role in the severity of punishment. Here, Durkheim explains the role of government in terms of the preceding considerations. For him, the intensity of punishment increases the more the central power assumes an absolute character. This is because absolute power makes government superhuman and offences against such a quasi-divine authority are considered as sacrilegious acts. Consequently, reaction against such offences will be more intense and the average intensity of punishment will increase. However, his short discussion of the crucial subjects of political structure is oversimplistic and inadequate for this issue. He examines the political structure as a

¹³⁰ Lukes and Scull 1983, p. 125

¹³¹ Ibid., p. 126

phenomenon isolated from the collective consciousness and culture. However, it must be asked whether they are totally separate? And is there any relation between "societal complexity and political structure?"¹³² These questions will be addressed in later chapters.

However, in one way, his explanation of the relationship between absolute political power and the severity of punishment can be understood in light of his theory of religion, collective consciousness and its relation to punishment. "When the state becomes absolute, Durkheim argues, its moral power as symbol and living expression of society's beliefs is intensified and overplayed with a kind of religiosity."¹³³ As Durkheim argues,

In fact, wherever the government takes this form, the one who controls it appears to people as a divinity. [People] see in the power, which invested in him an emanation of divine power. From that moment, this religiosity cannot fail to have its usual effects on punishment.¹³⁴

As we have seen, in this circumstance the collective consciousness is religious in character and political power is representative of collective sentiments. As a result any encroachment into this field leads to harsh reaction and vengeful chastisement.

132 Jones 1981, p. 1015

133 Cotterrell *Op. cit.*, p. 74

134 Lukes Scull 1983, p. 129

A similar discussion was introduced in *The Division of Labour in Society* where Durkheim discusses the proportionality between crime and punishment. He stated that "there are acts that are repressed with greater severity than the strength of their condemnation by public opinion."¹³⁵ Crimes like hunting and fishing, for example, are the object of punishment that is disproportionate to the indignation that they arouse in the collective sentiment. This severity, however, may be traced to another cause. The difficulty can easily be resolved if we perceive that the first and foremost task of an authority with power to govern is "to ensure respect for beliefs, traditions and collective practices - namely, defend the common consciousness from all its enemies."¹³⁶ Indeed, government became the symbol of collective consciousness and acts as its symbolic representative. Thus, government achieved a moral power and religiosity - legal rules are symbols of this sacred institution. Every unlawful act can be considered as an opposition against a quasi-sacred being. Statements of this nature in part answer those critics who believe that Durkheim's theory completely neglects the power of politics in the determination of punishment.

The preceding considerations pave the way for explanation of Durkheim's second law; that deprivation of liberty according to the seriousness of crime appears as a normal means of social control. Theoretically, there is a similarity of analysis between the second law and the first. For him, qualitative changes in punishment (the second law) and the simultaneous quantitative changes have the same root; the motive forces which determine punishment have changed. Mentalities and sensibilities have altered and criminal acts are

¹³⁵ Durkheim 1983, p. 41

¹³⁶ Durkheim *Ibid* p. 42

considered as offences that take place against people of equal status. "Blame is no longer the same (as it was in primitive societies in which collective consciousness is religious in character and any offence leads to a highly passionate reaction) and does not exclude pity; by itself, it calls for moderation."¹³⁷

¹³⁷ Lukes and Scull 1983, p. 130

V- Durkheim's Communicative theory of punishment

Once we understand what punishment is about for Durkheim, we must consider the ramifications of this way of thinking on penal practice. Punishment is not a method of imposing misery on delinquents, deterring them or others from committing crime, rehabilitating the offender, a matter of crime control policy, or any other utilitarian consideration. Durkheim considered punishment as a symbol and a language with social meaning which has the function of reasserting moral authority. The essence of punishment is blame, which expresses the feelings aroused by the disapproval of behaviour, reproach, and the power of moral order. For Durkheim punishment is not a matter of suffering but rather a matter of expressing and strengthening the duty on the offender and those witnessing the penal practice. Therefore punishment "is only justified to the extent that it is necessary."¹³⁸

Penal practice is thus a course of moral education. While Durkheim discusses punishment in schools as part of the process of education, he also made it clear that there is no significant difference between punishment in a school and punishment in a society, for Durkheim, a "class is a society."¹³⁹ The process of teaching should correspond to a society's historical and social context. Durkheim placed this argument in his general framework, in the general context of differences in collective psychology between civilized and uncivilized societies, arguing that:

¹³⁸ Ibid

¹³⁹ Durkheim 1984, p. 200. See also Garland Op. cit p. 45 and Cotterrell Op. cit, p. 77

in societies still uncivilized where individual sensibilities are hard to affect... it may be necessary for blame... to be translated in to some violent forms. But among people who have achieved a certain level of culture... these gross procedures are no longer necessary.¹⁴⁰

For the same reason he believed in "the absolute prohibition of corporal punishment"¹⁴¹ in modern societies.

Durkheim concludes that severe punishments are counter-productive in the conditions of modern society, because brutality is considered as immoral. Such forms of punishments are not only poor lessons for the criminal, but also fail to broadcast a constructive message to civil society. In contrast to primitive societies in which individuals are absorbed in collective ideas, in modern societies the cult of the individual constitutes, at least partly, the collective conscience. The human person is accorded a kind of religious respect and severe punishment is considered as sacrilege. In addition, the threat of punishment is more effective than its application, and punishment loses part of its influence when it is applied, "since one runs the risk of going through it too quickly, the threat-value of the penalty which retains its full force only so long as one has not been subjected to it may be rapidly exhausted."¹⁴² Another rule is thus that punishment should be a last resort. The weakness in Draconian laws is that they repeat themselves and lose their influence. As a rule he believes that the greater the severity of

¹⁴⁰ Ibid

¹⁴¹ Ibid., p. 183

¹⁴² Ibid., p. 199

punishments, the slighter effect they have - "As a result, the higher in the scale punishments are, the less economical they are."¹⁴³

However, it seems Durkheim was not completely satisfied with his analysis of division of labour as a source of solidarity in modern society. The institution of cult of the individual, for him, is not accorded adequate sacredness - human or quasi-divine conceptions are not powerful enough to shore threats to social order in modern society. He was still eager to attribute a stronger moral character to society. As we saw, for Durkheim religion was a source of solidarity and identification for individuals within a society, especially as part of systems of mechanical solidarity. However, what is the source of social integration in a non-religious and amoral age? Durkheim had previously discovered elements of holiness in society. As we saw above he occasionally ascribed society to sacred and transcendental things. Further investigations told him that not only was and is religion a critical part of the social system, but also that society has all the requirements of being a wholly sacred subject.

Religion is eminently social: it takes place in a social context and, more significantly, when men honour sacred things, they unwittingly honour the authority of their society. If religion has given birth to all that is essential in society, it is because the idea of society is the soul of religion. Sacred things are nothing more than collective ideals that have fixed themselves on a material object. Thus, a new religion emerged in modern society as a base of social solidarity: the religion of society. Hereafter Durkheim recklessly attributed to religion all the characteristics previously attributed to morality

¹⁴³ Durkheim 1972, p. 198

and society. If already, for him, morality and society were the same, henceforth religion and society are one.

VI- Durkheim's theory of religion

It was not until 1895 that I achieved a clear view of the essential role played by religion in social life. It was that year that, for the first time, I found the means of tackling the study of religion sociologically. This was a revelation to me. That course of 1895 marked a dividing line in the development of my thought, to such an extent that all my previous researches had to be taken up afresh in order to be made to harmonize with these new insights. [This re-orientation] was entirely due to studies of religious history, which I had just undertaken, and notably to reading of the works of Robertson Smith and his school¹⁴⁴.

What was this revelation, "indeed revolution,"¹⁴⁵ which marked a line of demarcation in Durkheim's intellectual preoccupations? This statement has often been cited without any adequate explanation about the nature of his inspiration. There is no explicit account of the reasons for this shift by Durkheim himself, or his followers. It can be said that, for him, religion is seen as "providing not only an integrative bond, but also the primordial source of thought, law morality and ... all social institutions."¹⁴⁶ In this section I will analyse the significance of religion in Durkheim's theory. The section is split into four parts. The first is a discussion of the origin of religion. Then, I move on to examine the relationship between religion and society, and the functions of religion. This will be followed by arguments and criticisms surrounding his methodological orientations in the study of religion, and ambiguities in his theory of the origins of religion and

¹⁴⁴ Lukes 1973, p. 237

¹⁴⁵ Takla, 1977, pp. 164

¹⁴⁶ Ibid., p. 164

society. Finally, I will draw some tentative conclusions regarding the relationship between religion and punishment in modern society.

In developing his theory of religion Durkheim selected "totemism"¹⁴⁷ as the most primitive religion, because it is the simplest and most original case. Constituent elements of "totemism" can be studied easily, and its original characteristics have not changed during the process of evolution. Durkheim hoped that through studying totemism he could gain insight into the nature, essential elements, causes, and functions of religion. He maintained that the nature of religion remained the same, that there is no significant divergence between primitive and developed religions, between the simplest cases and the most complex religions. All of them have "the most characteristic elements of religious life."¹⁴⁸ For him all religions fulfil the same function. In all its forms, its aim is to lift man above himself and to make him live a higher life than that governed by individual impulses.

¹⁴⁷ A totem is an object, usually an animal or plant (or all animals or plants of that species), that is revered by members of a particular social group because of a mystical or ritual relationship that exists with that group. The totem—or rather, the spirit it embodies—represents the bond of unity within a tribe, a clan, or some similar group. Generally, the members of the group believe that they are descended from a totem ancestor... The totem may be regarded as a group symbol and as a protector of the members of the group. In most cases the totemic animal or plant is the object of taboo: it may be forbidden to kill or eat the sacred animal. Totemism played an active role in the development of 19th and early 20th century theories of religion, especially for thinkers such as Emile Durkheim, who concentrated their study on primitive societies. Drawing on the identification of social group with spiritual totem in Australian aboriginal tribes, Durkheim theorized that all human religious expression was intrinsically founded in the relationship to a group.
See;

http://site.answers.com/main/ntquery.jsessionid=15b8http7fv5yn?method=4&dsid=2055&dekey=totem&gwp=8&curtab=2055_1&sbid=lc01a&linktext=totems

¹⁴⁸ Lukes 1973, p. 418

Durkheim sought to find the origin of religion in the sense of "the ever-present causes."¹⁴⁹ For Durkheim, society has all the essential conditions and necessary forces to produce religious feeling.

"Society in general, simply by its effect on men's minds, undoubtedly has all that is required to arouse the sensation of divine. A society is to its members what a god is to its faithful. A god is first of all a being that man conceives of as superior to himself in some respects and one on whom he believes he depends."¹⁵⁰

Thus god can be an attentive creature, like Zeus or Yahweh, or represent symbolic and mysterious forces as in totemism. However, society promotes in us the "sense of perpetual dependence ... society requires us to make ourselves its servants, forgetful of our interests. And it subjects us to all sorts of restraints, privations, and sacrifices without which social life would be impossible."¹⁵¹

According to Durkheim "a religion is a unified system of beliefs and practices relative to sacred things."¹⁵² According to this definition, totemism - as the most primitive system of beliefs and practices - can be regarded as a religion, because it has all the fundamental elements of a religion. He argues that "to isolate the factors underlying the origin of totemism is presumptively to discover at the same time the causes leading to

¹⁴⁹ Takla and Pape 1985, p. 79

¹⁵⁰ Durkheim 1915, p. 208-209

¹⁵¹ Ibid

¹⁵² Ibid., p. 44

the rise of the religious sentiment in humanity.”¹⁵³ Every clan has its totem which is “the badge of a group”¹⁵⁴ and the sacred symbol of the clan. In these societies individuals have their own totem that is sacred to them, but according to Durkheim these come “after that of the clan and in fact seem to be derived from it.”¹⁵⁵ There are three kinds of sacred objects in these societies: totems, animals or plants whose name the clan bears, and the members of the clan themselves.

However, the religiosity of these three kinds of object cannot arise from each other. They not only have the same status, but also “these three classes of sacred object in turn form part of a general cosmology.”¹⁵⁶ For Australian aboriginals all these things are elements of the clan and have their position in the society, and each of them belongs to one totem. For example, clouds belong to one totem, as does the sun, and so on. What then, is the source of this sacredness? Durkheim argues that it could derive only from a principle that is shared by all alike. This is the common principle to which the cult in reality is addressed. In other words, “totemism is not the religion of certain animals... it is the religion of a kind of anonymous and impersonal force.”¹⁵⁷ Durkheim did not use the terms, ‘principles’ and ‘forces’ in a metaphorical sense, because he believed these forces behave like real forces and in a sense, even are physical forces that bring about physical effects. “Does an individual come into contact with them without having taken proper precautions? He receives a shock that has been compared with the effect of an

¹⁵³ Giddens 1971, p. 106

¹⁵⁴ Durkheim 1915, p. 111

¹⁵⁵ Ibid., p. 190

¹⁵⁶ Giddens 1971, p. 108

¹⁵⁷ Durkheim 1915, p. 190

electric charge.”¹⁵⁸ These forces have moral characteristics as well, because members of a clan feel they must follow them as their ancestors have done.

Durkheim thus proposes a kind of social dynamism as the origin of religion, since coming together and participating in shared life is, for him, a source of energy that transforms the individual from his ordinary position. “All he feels is that he has lifted above himself and that he is participating in a life different from the one he lives ordinarily.”¹⁵⁹ In this new state of affairs he seeks external objects to materialize these experiences to them. He attributes these energies and forces to every thing that is available to him and attracts his attention. This is the origin of totemism as the simplest religion. It should be emphasised that Durkheim believed that there is no substantial difference between the simplest cases, like totemism, and the most sophisticated religions.

Thus, for him “the idea of force is of religious origin.”¹⁶⁰ These forces are the translation of common principles and religious forces. These collective values emerge when a certain number of individuals come together. This analysis also shows how “religion is social in terms of its origin.”¹⁶¹ According to this analysis, society has all the essential elements to produce religious sensations for the creation of sacred being. This argument shows that society and religion are highly similar. According to his scientific method, the similar effects of religion and society are a sign of their likeness in reality.

¹⁵⁸ Ibid., p. 192

¹⁵⁹ Ibid., p. 222

¹⁶⁰ Ibid., p. 206

¹⁶¹ Talka and Pape 1985, p. 79

For Durkheim, "religious forces are in fact only transfigured collective forces."¹⁶²

Indeed, for him, spiritual powers are no more than the common and universal values in a society. As Giddens has argued, Durkheim saw religion as "society becoming conscious of itself, although in a symbolically transmuted form."¹⁶³ Consequently, religion is the translation of society into symbolic language.

Before moving on it seems appropriate to discuss some of the criticisms which have been made of Durkheim's methodology in the study of religion and his theory of religion and society. It has been claimed that there is a clear shift in Durkheim's methodology from *The Division of Labour* (1893) to *The Elementary Forms of Religious Life* (1912). It has been said "Durkheim in his sociological epistemology and other related elements of his thought went off also, in his last phase, in another direction that has been called an "idealistic sociology".¹⁶⁴ by Talcott Parsons as However, as he himself frequently insisted in *The Elementary Forms*,¹⁶⁵ his methodology had not changed and he had constantly followed his positivist method of cause and effect. As Giddens argues, *The Division of Labour* "establishes a framework of thought which remained at the basis of all his later writings. Subsequent works (like, *The Elementary Forms of Religious Life*) are virtually all elaborations of themes which are originally to be found there."¹⁶⁶ It has been assumed that Durkheim was "interested primarily in religious systems of belief...

¹⁶² Ibid., p. 327

¹⁶³ Giddens 1995, p. 20

¹⁶⁴ Parsons Talcott 1949, p. 468

¹⁶⁵ Durkheim 1915, pp. 2, 3, 4, 7, 8, 21, 22, 35, 84, 85, 92-93, 162, 191, 192, 203, 216, 227, 249, 420, 431

¹⁶⁶ Giddens 1995, p. 40 See also Giddens 1971, pp. 105-106

[while] his interest was rather in the moral forces,"¹⁶⁷ which are social forces, translated and symbolized by religious ideas. Durkheim himself asserted that he "adopted a focus on religion in 1895 only after realizing that it provided the basis for his earlier attempt to ground an empirically valid ethics in the original version of *The Division of Labour in Society*."¹⁶⁸ What changed was the subject matter of his investigation, which is a system of ideas. These ideas are wrapped in mysteries and symbols. He maintained that the science of sociology should go beneath these symbols and discover their reality.

For Durkheim all human institutions, including religion, are real and we should "set ourselves before reality."¹⁶⁹ He claimed that nothing is false in religion; religious conceptions, rites and practices are representative of the reality which is society, although these conceptions are translated in symbolic and mythological language. Sociology can and should discover the real meaning of these mysterious symbols. He claimed that he had compared all religious systems, "past as well as present, the most primitive and simple as well as the most modern and refined,"¹⁷⁰ without any exclusion in seeking out the most common and essential elements of religion. Contrary to Spencer,¹⁷¹ he denied religion any supernatural or metaphysical characteristics, arguing that "religion [is] nothing other than natural manifestation of human activity."¹⁷² He put aside all commonsense notions of religion and tried to free his mind from these general ideas, as

¹⁶⁷ Rawls 1996, p. 438

¹⁶⁸ Ibid., p. 437

¹⁶⁹ Durkheim 1915, p. 22

¹⁷⁰ Ibid., p. 22

¹⁷¹ Ibid., p. 22

¹⁷² Ibid., p. 22

influence of these rational notions "can prevent us from seeing things as they are."¹⁷³ In this there is no alteration in his methodology from his earlier works to his study of religion. On the contrary, as he explicitly states,¹⁷⁴ he followed the same approach in *The Elementary Forms of Religious Life* as he set out in *The Rules of Sociological Methods*, *The Division of Labour in Society* and *Suicide*.

It has also been argued that Durkheim closed off some initial and crucial questions about society. Some premises have been assumed to be self-evident, despite their containing serious uncertainties and ambiguities. For instance, he discusses society, its function and social dynamic, but is not concerned with the origin or creation of society.¹⁷⁵ Likewise, when he discusses social solidarity he asks "whether men draw closer to one another because of strong effects of social solidarity, or whether it is strong because men *have* come closer together,"¹⁷⁶ but does not provide a clear answer. In addition, it is said that there are some circularities and contradictions in his theory of society. For example, in *The Elementary Forms* he studied rites and their influence upon vitality, belief, effervescence, and morality, but did not answer the question of whether these rites create society or, on the contrary, these ceremonies are performed in societies which already existed. Similarly he believed that "the collection of society was formed

¹⁷³ Ibid., p. 22

¹⁷⁴ Durkheim 1915, p. 22

¹⁷⁵ ["Durkheim does not explain how a sufficiently large number of individuals came together".] See: Fisher; Kyum 1989, p. 2 Footnote

¹⁷⁶ Durkheim 1984, p. 25

by all the individual consciences of its present and past,"¹⁷⁷ while simultaneously arguing "that society created the (individual) conscience."¹⁷⁸

Although the contradictions and ambiguities in Durkheim's sociological theory are not my main concern, a short discussion may be helpful. Durkheim believed that "like any other society, the clan only lives in and by means of the individual consciousness of which it is made."¹⁷⁹ In other words social consciousness is constructed by the individual consciousnesses. Nevertheless, it should be noted that the nature of society and its forces is different from the sum of individuals as its constituent elements, just as water is made by hydrogen and oxygen, but the characteristics of water are not the same as its constituent elements. "The forces which are generated by human association"¹⁸⁰ are independent and have particular constraints upon the individual. Indeed it can be understood from this theory that the collective sentiment is constructed by individual consciousness but the outcome is not the same as sum of individual consciousnesses. These collective sentiments become additional, independent social forces that directly constrain individual behaviours. He does not argue about origin of society in more detail. His starting point is that where a society is already created. Thereafter the idea of forces can be the base for other social activities and social phenomena like religion.

Thus, his theory of individual consciousness constructing social consciousness and in particular his ideas about force, which are scattered through his works - especially

¹⁷⁷ Dubeski 2001, p. 61

¹⁷⁸ Ibid.

¹⁷⁹ Ibid., p. 223

¹⁸⁰ Giddens 1995, p. 21

The Elementary Forms of Religious life —¹⁸¹ may solve some of the above difficulties. His argument here is that society is conscious and that social forces are real forces. For him, collective forces:

are forces as real as cosmic forces, though of another sort...the proof that the reality of collective tendencies is not less than that of cosmic forces is that this reality is demonstrated in the same way, by the uniformity of effects. [They] cause us to act from without, like physico-chemical forces to which we react.¹⁸²

This account of social forces recalls his definition of social fact:

"A social fact is every way of acting, fixed or not, capable of exercising on the individual an external constraint; or again, every way of acting which is general throughout a given society, while at the same time existing in its own right independent of its individual manifestations."¹⁸³

These conscious forces are the origin and base of the important social conceptions. He frequently declares that religious forces are collective forces and religious forces are not other than collective. But these analyses could be justified when and where a smallest group of societies like clans were already constructed.

¹⁸¹ Durkheim 1915, pp. 206-211-223-327-329-420-421-424

¹⁸² Durkheim 1915, pp. 309-10

¹⁸³ Durkheim 1966, p. 13

The final part of this discussion will attempt to explain Durkheim's functional theory of religion. This argument asks, essentially: to what social needs does religion correspond or, in other words, what are the social benefits of religion? From this point of view religion is placed at the heart of social functions. Durkheim argues, "that nearly all the great social institutions were born in religion,"¹⁸⁴ and it is only religion that is potentially capable of revitalizing these phenomena. For that reason he worries about the weakness or lack of religious considerations in modern societies: "the former gods are growing old or dying, and the others have not been born."¹⁸⁵

For Durkheim, religion is seen as playing two important social functions, of which the moral function is the most fundamental. It can be said that, for him, the most basic function of religion is the creation and re-creation of morality as a base of social integration. The moral function is the "only one that is real."¹⁸⁶ The effect of rites as a physical translation of religious beliefs is the "re-creation of moral being."¹⁸⁷ He argues that the main and "sole purpose of religious ceremonies is to arouse certain ideas and feelings, to... join the individual to society."¹⁸⁸ This argument guides us to the second function of religion, that of social cohesion.

Religion, according to Durkheim's definition, is the combination of collective ideas and practices, which are the basis of social integration. Indeed, it can be said that

¹⁸⁴ Durkheim 1915, p. 421

¹⁸⁵ Ibid., p. 429

¹⁸⁶ Durkheim 1915 p. 379

¹⁸⁷ Ibid., p. 352

¹⁸⁸ Ibid., p. 382

the most important reason for his attachment to religion is the effect of religious ideas, sentiments and practices on social unity. This is because, as discussed earlier, social solidarity is his permanent concern.

What makes such a society a 'society' (for Durkheim) at all is the fact that its members adhere to common beliefs and sentiments. The ideas which are expressed in religious beliefs are therefore the moral ideals upon which the unity of society is founded.¹⁸⁹

The members of a clan take part in the same rites; they behave alike, and repeat the same songs, words and movements. They bear the name of one totem. All of these similarities tell them that they are members of the same moral community and they recognize their kinship, which makes them closer to each other. They choose an emblem because it is a symbol and

a rallying point for any sort of group requires no argument. By expressing the social unity tangibly, it makes the unit itself more tangible to all ...(and) fusion of all the individual feelings into a common one - the signs that express those feeling must come together in one single resultant.¹⁹⁰

There is another kind of religious ceremony that has the same effect. When a member of the clan dies, the clan faces a special situation. Social solidarity has been

¹⁸⁹ Giddens 1971, p. 112

¹⁹⁰ Durkheim 1915, pp. 231-232

threatened through loss of a member - this condition pulls individuals closer together, and they hold to one another and cry. For Durkheim "the basis of mourning is the impression of enfeeblement that is felt by the group."¹⁹¹ The crucial function of this rite is to counteract the source of enfeeblement.

In conclusion, we can see that religion is an eminently social issue. "Religious representations are collective representations that express collective realities; rites are ways of acting that are born only in the midst of assembled groups and whose purpose is to evoke, maintain, or recreate certain mental states of those groups."¹⁹²

However, although Durkheim generally believed that there is no difference between the role of religion in primitive and modern societies, he did not fully address the role and function of religion in developed societies. As we saw, he primarily investigated religion and its functions in ancient societies, asserting that the same role can be assumed for religion in all societies. This analysis is not readily extended to the modern, where religion and its related practices do not reach beyond the private sphere and "offences against the gods are (no longer) offences against society."¹⁹³ Modern society cannot be simply conceptualized as a moral unit; it is more a "coalition or compromise of interests."¹⁹⁴

¹⁹¹ Durkheim *Ibid* , p. 405

¹⁹² *Ibid.*, p. 9

¹⁹³ Durkheim 1984, p.50

¹⁹⁴ Cotterrell Roger 1999, p. 94

In retrospect, solidarity that comes from likeness in primitive society is at its limit when the collective conscience completely envelops the conscience of the individual and leaves no space for independent thought and feeling. A powerful centripetal tendency is anticipated in these societies. Collective consciousness is religious in character in these kinds of societies. "In early societies, law and morality are both largely expression of collective beliefs or sentiments rooted in religious sources."¹⁹⁵ But as discussed above "in the modern societies the situation is much more complex. It is no longer possible to think of religion as providing an all-embracing structure of beliefs dominating society."¹⁹⁶

As Durkheim argues, as a result of the division of labour, the scope of common beliefs became smaller and its importance much reduced. In modern, industrial societies, the vast division of labour enhances individualization. Individuals no longer carry out the same tasks, have identical interests, nor share the same essential perspectives on life. "Society becomes more effective in moving in concert, at the same time as each of its elements has more movements that are peculiarly its own."¹⁹⁷ The more the division of labour is extended, the stronger the cohesion that results from this solidarity. On the one hand, the movement of each member is much more individualised, as it is more specialized; on the other hand, each individual depends more firmly on society the more it is divided.

¹⁹⁵ Ibid., p. 33

¹⁹⁶ Ibid., p. 52

¹⁹⁷ Durkheim, 1984, p. 85

While collective consciousness is not in danger of disappearing completely, it increasingly comprises modes of thinking and feeling of a very general, indeterminate nature, which leave more room for a multitude of individual acts of dissidence.¹⁹⁸ The core theme of the *Division of Labour* is that sacred common principles and social transcendent subjects always exist in society because without these fundamental moral principles society would not exist. Society as a whole must rely on sacred common principle. This is the content of collective consciousness that is transformed in the course of social development. For example, if in primitive societies traditional religious and divine conceptions were the symbol of collective consciousness, in modern societies novel conceptions such as individualism, human rights, justice, nation, freedom of speech and such can be considered as the base of social solidarity. As will be discussed in the third chapter, a kind of civil religion has replaced traditional and metaphysical religion.

As all the other beliefs and practices assume less and less religious a character, the individual becomes the object of a sort of religion. We carry on the worship of the dignity of the human person, which, like all strong acts of worship, has already acquired its superstitions.¹⁹⁹

The necessity for the sacred common principles as the base of social integration in both ancient and modern societies is a crucial element of Durkheim's theory of society. However, the *Division of Labour* implies an intrinsic paradox in Durkheim's theory of social solidarity in modern society: the greater the disparities, the greater the social

¹⁹⁸ Ibid., p.123

¹⁹⁹ Ibid., p. 122

integration. In this sense he cannot fully resolve his concern with the contradiction between centrifugal and centripetal forces in contemporary societies. It is hard to accept that the more developed the division of labour, the more specialization, and the more differentiated and individualised are members of society, the stronger the social solidarity. Where does this strength of solidarity come from, once individualization is highly developed? How are contradictory moral guidelines of individual dignity and social interest to be reconciled in modern societies? Why should significant social disparities not be problematic in modern societies?

After his great discovery of the nature of religion in 1895, Durkheim returned to this question. He believed that human religion, like the "cult of the individual" in modern societies, could not fully function as divine and superhuman religions worked in primitive societies. It was for this reason that Durkheim sorrowed over the death of gods and the lack of rebirth. Although he believed religion to be something social and that society has all the requirements necessary for the creation of sacred things, but still he did not reach any clear conclusions as to how possible disintegrations could be resolved in contemporary societies. My concern is this: can it be claimed that religion could play the same role in current societies as it did in primitive societies? As a logical result of Durkheim's theory of religion and society one could reply to this question in the affirmative.

I will argue that religion, communal or supernatural, in every society is the axis of social integration. If an expressive individualization and exaggerated freedom places

social solidarity in danger, an increasing movement towards divine and supernatural religion as a stronger foundation of social solidarity is possible. As a result of this reorientation, the essence of social values becomes more religious and sacred in character. This reorientation has profound effects on the area of criminal justice. Violation of sacred normative rules brings about a severe social reaction. This subject will be discussed in following chapters, in particular chapters four and five (severity of punishment in the USA and Iran).

VII-Conclusion:

Durkheim set out the argument in his first lecture-course, entitled *social solidarity*, of what was to become *The Division of Labour*. He studied the nature of beliefs, sentiments, and bonds, which can solve the dichotomy and contradiction between individual personality and social solidarity. He recognized two kinds of solidarity that are symbolized by two kinds of law. In the first, society is a more or less closely organized totality of beliefs and sentiments common to all members of that society. This is the "mechanical solidarity" that is represented by repressive law. The second is a system of differentiated and specialized functions that are united in definite relations. This is "organic solidarity" brought about by the division of labour and symbolized by restitutive law. Collective sentiment in the new situation is not absent, but its scope has become smaller and its content has changed from religious and sacred to a 'cult of the individual' that is less religious in nature. Any variation in severity of punishment should be understood within this framework.

Morality as the sacred normative principle for Durkheim, is the foundation of social integration. It is not just a matter of discipline and a source of legal rules, but is in addition the matter of social solidarity and society itself. Society is the end and source of common morality, and morality and society are one. Common morality includes all the ideas and sentiments that constitute a human consciousness and shapes the mass of individuals into a cohesive aggregate. For Durkheim collective or social sentiments, collective representations, morality, religious forces and social forces are common

conceptions. These are the other terms for ideas and sentiments that, from Durkheim's point of view, encompass much of what modern sociology calls culture.

Durkheim opened up important dimensions in the investigation of punishment as a social process. He denied any rational, utilitarian, calculative or deterrent effect for punishment. The symbolic, emotional, moral and expiatory character of punishment is the essential nature of punishment which, for him, may be modified or graduated but not substantially changed. Emotions and sentiments are crucial elements in his sociological theory. Common principles and "moral rules [are] emotionally grounded products of society,"²⁰⁰ and can only be protected emotionally. These collective sentiments are fundamental in communal relations and social cohesion. Any offence against social principles gives rise to a punitive reaction. The severity of this response depends on the strength and sacredness of the sentiments and the gravity of the offence. Punishment in Durkheim's view has a profound cultural implication. For him, penal practice is an emotional, expressive, productive and a communicative social procedure.

After new investigations of religion in 1895, he realized that social phenomena like morality and social solidarity could best be analysed through the lens of religion. This was a revelation which marks a departure in his intellectual reflections. According to his definition religion is a unified system of beliefs and practices relative to sacred things. Social integration can be considered as the crucial result of religion's moral function. Further reflections show that religion, for Durkheim is a symbol of society and religious

²⁰⁰ Shilling and Mellor. *Op. cit.*, p. 195

rites are ways of acting that are born in the midst of assembled groups, the purpose of which is to evoke, maintain, or recreate certain collective mental and emotional states of those groups.

However, after this re-orientation Durkheim stopped applying religion as an analytical tool of social investigation, and said nothing about the relationship between religion and punishment in modern societies. This is no great surprise, as he did not precisely explicate the position of religion in modern society. What he generally explains is that religion is something social, and there is no difference between primitive and modern societies. Supernatural and traditional forms of religion were, for him, something that belonged to ancient societies. But the question of how exactly society in the modern era could be embedded in a religious form, was not answered by Durkheim. If it is the case, as Durkheim argued, that religion had originally been nothing more than a society that had become aware of itself, and that society has all the requirements for the creation of sacred being, it would be reasonable to argue that religion in traditional or civil form emerges when the social requires. For example, developed individualization, social conflicts, competing interests and fragmentation amongst social sectors can put social integration in danger. A conscious society could resort to religion, even in a traditional and supernatural form, as a base for social solidarity. As a result, social morality and social solidarity become more sacred in character and any violation faces a repressive and severe reaction. This analysis would be in harmony with Durkheim's theory of society, religion and punishment. In this thesis, I will attempt to develop this neglected part of

Durkheim's theory and utilize religion as a sociological analytical tool in the investigation of penal practice in the modern era.

But before starting that examination it is necessary to resort to the fact that, despite the great insights offered by Durkheim, his theory of punishment is not free of flaws. Durkheim provided a relatively simple picture of punishment and society. For him penal practice is an explicit expression of sacred social values. He failed to observe fully some crucial dimensions of penal practices in modern societies. The complexities of political relations and the influences of specialist institutions had little weight in his sociological analysis of punishment, and he ignored major sociological trends like professionalization, bureaucratization and the rational process of crime control policy (Weberian theory) and their influence on penal practice. Penal practice was simply an automatic and emotional reaction to any source of social threat. He failed to observe how prisons, for example, are managed through surveillance, organizational and bureaucratic rules rather than emotive and moral ones. For Durkheim, lawmakers, judges, and professional performers of punishment were just instruments of public moral emotion. However, bureaucratic and organizational requirements can and do limit public involvement in the performance of penal practice. The iron principle of bureaucracy, and a technical and scientific approach to societal establishments including penalties at least partially prevent the performance of punishment from being fully social.

Modern forms of social control, considerations of political expediency, and technical and disciplinary mechanisms of repression are a new framework of analysing

penalty in modern societies. Punishment is observed by Foucault as a set of practical methods of power-knowledge for managing individuals as part of a political strategy of control. Today discussion about punishment without mentioning Foucauldian theory is implausible. Foucault's analysis of penal practice promoted the position of the sociology of punishment and constitutes a significant section of the literature on the sociology of punishment. Normalization, standardization, and the economy of subjection as functions of punishment which are analysed by Foucault are significant to the nature of modern punishment. The Foucauldian approach and the Weberian theory of rationality and institutionalization are prime part focus in the next chapter.

Chapter III Modern Penal Culture

Introduction

The importance of Durkheim lies in his opening up of speculation about the relationship between law and social order. As was argued in the previous chapter, for Durkheim, punishment is a crucial means of studying society. It is a means of expressing common attitudes, protecting morality and upholding social solidarity. According to him, crime strikes the universal and sacred moral sentiments of nations and produces a passionate response. In the first stage of his investigation, sacred morality was the foundation of social solidarity, but once he discovered religion as an analytical tool, he argued that religion is an expression of society and that religion and society are one. Any violation of the sacred entity gives rises to vehement of anger amongst the believers. Penal policy is a translation of public reaction against threats to the transcendent aspects and religious characteristics of a society. In his theory it is society that punishes in order to express and protect itself.

However, Durkheim overlooks certain aspects of modern punishment, in particular the technical and organizational dimensions of penal practice. He recognized the existence of state officials but considered "them as carrying out collective moral sentiments."¹ For him, officials and governmental institutions are loyal interpreters and appliers of social morality and add nothing to the processes of penal policy making and

¹ Penner *et al.* 2002, p. 670

the application of punishment. As has been argued, "this enables Durkheim to ignore questions about power, conflict of interests, the role of professions [and] bureaucracy."² He ignored managerial and administrative aspects of penal practices, and failed to observe the crucial role of specialist institutions, bureaucratic considerations and rational processes of crime control. By contrast, technical apparatuses related to managerial goals, administrative systems concerned with risk management, and political concerns of power have leading positions in the contemporary analysis of penal systems. Bureaucratic and organizational demands can limit public involvement in the performance of penal practice. Lawmakers, judges and professional performers of punishment are not just instruments of public moral emotions but pursue their own professional ends. Effective crime control, security, bureaucratic rationality and the politics of cost - efficiency constitute important parts of the modern penal system. Prisons, for example, are managed through surveillance and bureaucratic organizational rules, rather than emotive and moral ones. Nowadays punishment is mostly performed behind walls in such a way that is not open to the public.

Such processes of rationalization and bureaucratisation (Weber) and the role of the technology of power in the determination of punishment (Foucault) constitute the main themes of this chapter. I will in addition address another dimension of modern culture which is not fully developed by Durkheim. Although Durkheim dealt with question of sensibilities and mentalities, he studied the issue at a macro - level through social structures like religion and tradition. He indicates the role of civilization in the

² Ibid

softening of severe penalties, but does not address the function of the individual's psychological and emotional reaction against cruel and barbaric punishment. Alterations of individuals' sensibilities and mentalities, the process of civilization and the consequences of these procedures for modern punishment will be looked at in the latter part of this chapter. Finally I will show that although Foucault and Weber recognized the crucial role of religion in society, neither used it effectively in their social investigations.

I Weber

I-1 State Involvement and Rationalization of Punishment

The history of state intervention in the sphere of criminal justice system is a lengthy one, extending from the eighteenth- to the early twentieth- century. The state's monopolisation and administration of the process of punishment as part of its monopolization of the legitimate application of violence: "it engenders, more generally, a form of permanent public peace, with the compulsory submission of all disputes to the arbitration of the judge."³ Rationally ordered punishment and state justice replaced private vengeance. The intervention and monopolisation of the nation-state in the penal realm paved the way for the formation of modern institutions of criminal justice and the presence of trained professionals in specialist organisations. The professionalization of crime control as a general trend began in the nineteenth century. "The increasing presence of the state in the business of control of deviancy, the eventual development of a centralised, rationalised and bureaucratic apparatus for the control and punishment"⁴ is the main theme of this section. I will study this issue in the light of Weber's theory of modern society.

At first glance there is no explicit account of punishment in Weber's theory. However, although he does not present an independent discussion of penal practices, a deeper analysis shows that it is an account of the general trends which have dominated the penal realm for a long period in western countries. Concepts like rationalisation,

³ Weber 1978, p. 908

⁴ Cohen 1994, p. 13

professionalization and bureaucratization have widely influenced penal practice in modern societies. Rationality separates the institution of punishment from social contexts like religion and morality, or at least weakens the relationship between penal practice and its social grounds. Bureaucracy reduces the effect of social sentiments in organizations (e.g. personal knowledge of judge and jury). The reason for such conditions is that social organizations and their staff are primarily performing in accordance with their professional and institutional requirements of bureaucratic hierarchy, predetermined duties, expertise and so on.

The intervention of sciences like criminology, psychology and sociology, moreover, in the determination and application of penal policy have created a new penal culture. In this regard the Weberian literature introduces a different perspective on punishment including impersonality and dehumanisation. From this viewpoint, "love, hatred, and all...irrational and emotional elements"⁵ are eliminated from the official penal practice sphere. Criminal justice becomes an autonomous sphere that is governed by its own particular principles and managerial goals. Weber endeavours to present a value-neutral sociology of law. His description of law does in fact bring with it the suggestion that a rational, stable legal structure is to be preferred to laws which are emotional and unstable. However, Weber's theory of modern society in general and its connection with penal practice should be analysed through study of two crucial elements of his theory, bureaucracy and rationality. Firstly, I will explain these two crucial pillars of Weber's sociology of modernization and their relationship with law and punishment

⁵ Weber 1991, p. 216

then, at the end of this section, I will analyse the apparent contradiction between his ideas of rationality and bureaucracy on the one hand, and social, cultural and religious values on the other hand.

I-2 Bureaucracy

In Weber's Bureaucracy can be seen theory as a particular example of the application of rationalization to human organisation and the harmonising of human behaviour. It is the dominant mode of operation in the state apparatus, and a distinctive sign of modern social structure in general.

In social terms generally, the rationalisation was constituted by the spread of bureaucratic control, the establishment of modern systems of surveillance, dependence on the nation-state as a controlling agency and the rise of new forms of administration.⁶

It is through bureaucratic co-ordination that the administration of huge industries, economic plans, and the control of large numbers of people by modern states is possible.

For Weber, historically, there was no inevitable correlation between the form and size of a state and its bureaucratic system of administration, but there is a kind of logical proportionality "between the degree of bureaucratization and the state's expansionary

⁶ Weber 1991, p. xix

force”⁷. For instance, as he himself cites in *Economy and Society*,⁸ the Roman and British Empires were the most expansive states of their time, but only partly rested upon bureaucratic foundations. However, he believed that “technically the large modern state is absolutely dependent upon a bureaucratic basis.”⁹ In the qualitative expansion of official tasks, professionalization and division of labour invokes more strongly the necessity of bureaucratization than a quantitative expansion. He tries to provide historical evidence to show how the intensive expansion of administrative tasks gave rise to bureaucratization.

Bureaucratization and specialization are linked in Weber’s evolutionary theory of western political societies. These connections can partly be seen in the emergence of party politics and the career politician but also in the “development of war technique, [which] called forth the expert, and specialized officer, and the differentiation of legal procedure [which] called forth the trained jurist.”¹⁰

The centralization of the state and the gradual abdication of the prince’s autocratic rule in favour of an expert officialdom in confrontation with notables, estates and parliament in the struggle for political power are the other parts of his theory of the simultaneous development of bureaucratization and professionalization in the political sphere.

⁷ Weber 1968, p. 970

⁸ *Ibid.*, p. 970

⁹ *Ibid.*, p. 971

¹⁰ Weber 1991, p. 88

The separation of public functionaries into two categories ...[as] administrative officials and political officials is considered as a kind of evolution in specialisation and bureaucratization realm, as well among purely political factors, the increasing demand of a society... for order and protection ("police") in all fields exert an especially preserving influence in the direction of bureaucratization.¹¹

In addition to the political factors mentioned above, there are a number of technical factors contributing to the development of bureaucratization and professionalization; for example growing wealth, the development of the tax system and public finance, and modern means of communication, like public roads, railroads, and telegraph. However the most important reason for the development of bureaucratic organizations, for Weber, is the technical superiority of bureaucracy over any other form of organization. As he argues: "the fully developed bureaucratic apparatus compares with other organizations exactly as does the machine with the non-mechanical modes of production."¹²

The superiority of bureaucratization over any other traditional form of organization related predominantly to certain characteristics of bureaucracy. According to Weber, these characteristics can only be seen in fully developed modern states or in the most advanced institutions of capitalism in the private economy. Bureaucratic authority in the public sphere and bureaucratic management in the private economic sphere,

¹¹ Weber 1968 p. 972

¹² Weber 1968, p. 973

required "fixed and official areas, which are generally ordered by rules, that is, by laws or administrative regulations."¹³ The regular activities, the authority to give commands, and methodical provision for the accomplishment of duties are, according to Weber, three essential elements of this principle. The principle of office hierarchy aligns the regulated activities of lower office to the decisions of higher authority. This principle "is found in all bureaucratic structures: in state and ecclesiastical structures as well as in large party organization and private enterprises."¹⁴

The management of the modern office through written drafts is another key principle of bureaucracy. The more important issue for Weber, however, is the separation of the office from the private property of the official: "office property is not owned by the official, and a separation is maintained between the official and office, such that under no conditions is the office owned by its incumbent."¹⁵

Office management is specialized and the modern office requires qualified and trained officials. This increasingly holds for the modern executive and employees of private enterprises as well as state officials. The division of labour, the expansion of social services, the emergence of differentiated social tasks, and the development of communications required specialized office management: "the necessity of specialization to fulfil specific administrative tasks is as important as size [of state] in promoting

¹³ Weber 1991, p. 196

¹⁴ Weber 1991, p. 197

¹⁵ Giddens 1971 p. 158

bureaucratic specialization.”¹⁶ The requirement of technical qualifications in administrative organization is an ever-increasing phenomenon. The only exceptions to this general rule, Weber argues, are top politicians like ministers and presidents. “Precision, speed, unambiguity, knowledge of the files, continuity, discretion.... are raised to the optimum points in the strictly bureaucratic administration.”¹⁷ In modern capitalist economies, the rise of the national and international markets has played an important role in the development of specialized bureaucracy.

The reduction of modern office management to general rules, their implementation, and the importance of documents grant the bureaucracy a functionally impersonal character. As Weber argues:

developed bureaucracy also stands, in a specific sense, under the principle of *sine ira ac studio* (without anger and without enthusiasm). Bureaucracy develops the more perfectly, the more it is “dehumanised”, the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements which escape calculation. The more complicated and specialised modern culture becomes, the more its external supporting apparatus demands the personally detached and strictly objective *expert*, in lieu of the lord of older social structures who was moved by personal sympathy and favour, by grace and gratitude.¹⁸

¹⁶ Giddens Ibid p. 159

¹⁷ Weber 1991, p. 973

¹⁸ Weber 1968, p. 975

Expert officials, professional knowledge, political and disciplinary considerations, objectivity, and loyalty in power have led to the permanent and powerful character of the bureaucratic machine which, for Weber, is "superior to every resistance of mass or even of communal action."¹⁹ These features give the bureaucracy a kind of immunity and stability both from inside against individual bureaucrats (which, for Weber are only single cogs in an ever-moving mechanism), and from outside against social change, revolution and political powers, even of absolute monarchy. As he argues, bureaucracy is "among those social structures which are hardest to destroy."²⁰

For Weber, there is a correlation between the development of bureaucracy and law. On the one hand, "only bureaucracy has established the foundation for the administration of a rational law."²¹ On the other hand, law can be introduced as a key element in processes of bureaucratization. Most characteristics and functions of bureaucracy - official jurisdictional areas, regular activities, distribution of duties in a stable way, application of office hierarchy, the management of office, are based on written documents - became possible through legal rules. For Weber, law is a crucial component of bureaucracy. "Modern organizations are immersed in a sea of law. They are born through the legal act of incorporation, they die through the legal act of bankruptcy, and they continually work in a legal environment."²²

¹⁹ Ibid., p. 228

²⁰ Weber 1968, p. 228

²¹ Ibid., p. 975

²² Edelman and Suchman 1997, p. 480

There is moreover, a close relationship between juristic rationalization and professional politics. Weber considers the jurists trained in the universities on Roman jurisprudence to be group who had great influence on the conduct of politics. As he argues: "everywhere [in continental countries] the revolution of political management in the direction of the evolving rational state has been borne by trained jurists."²³ The process of rational juridical thinking independent of theological forms of thought can only be seen in occidental countries, "through the borrowing of ancient Roman jurisprudence."²⁴ Weber traces this process in various political institutions of continental countries from the sixteenth century onwards and concludes that one can find "everywhere the spirit of jurists."²⁵ The presence of lawyers in occidental politics after the rise of parties is understandable. The craft of the trained lawyer is to plead effectively the cause of interested clients (as is the case in the management of politics through parties). In this, "the lawyer is superior to any officials... only the lawyer successfully pleads a cause that can be supported by logically strong argument."²⁶

Broadly speaking, all aspects of modern punishment are influenced by the bureaucratic system and by specialized bureaucrats. Bureaucrats pursue their professional functions in a bureaucratic environment and in accordance with bureaucratic requirements. These conditions have transformed the culture of punishment in modern societies. The increase in population, the abolition of corporal and capital punishment, rising rates of criminalization, and the centralization of government accompanied by their

²³ Weber 1991, *Ibid* p. 93

²⁴ *Ibid.*, p. 93

²⁵ *Ibid.*, p. 94

²⁶ *Ibid.*, p. 94

monopoly on punishment eventually installed the prison in "the central place in the system of criminal punishment"²⁷ in late nineteenth century societies.

Prison officers, psychiatrists, probation officers and criminologists are not mere instruments of penal policy. They have their own ideologies. They apply these attitudes in the performance of penal practice and influence the criminal justice system. They work on the basis of considerations of expediency and effectiveness, not morality or public opinion. Their expertise, accompanied by firmly fixed principles of bureaucracy, grants them a kind of immunity against other social forces. The iron principles of bureaucracy and technical approaches in social institutions like punishment prevented penal practice from being fully social. Penal practice "becomes increasingly technical and professional."²⁸ The correctional facilities and mental institutions, constructed in the United States in nineteenth century, are remarkable instances of this new trend in the sphere of punishment.

These developments may be seen as a reduction in the expression of "political concern"²⁹ within the act of punishing, or as part of a political and economic strategy of increasing state involvement "in the habituation, supervision, training and pacification of the domestic population."³⁰ However, this process shows that penal practice in modern societies is less accessible to the public because, as Weber argues, from the bureaucratic and professional point of view the intervention of public sentiments in such a

²⁷ Rothman 1971, p. 240

²⁸ Garland Ibid., p. 187

²⁹ Garland Ibid., p. 187

³⁰ Cohen and Scull 1983, p. 312

professional sphere is destructive, and disturb managerial goals. The construction of prisons with sturdy walls on the outskirts of cities in mid - nineteenth century USA symbolically shows the detachment of the new trend of crime control from communal attitudes.

Although Weber never fully articulated the term “instrumental rationality” in his elaboration of the process of formal rationalization, it is not far from his idea of rationalization. He treated bureaucracy as an instrument that can be used by every political system, democratic or non-democratic. Such an analysis can be applied to the Weberian theory of law, because formal rational law can be considered neutral and practical in every cultural context:

For example, in contemporary Islamic states, there is ample evidence of partial secularization, the formal rationalization of legal system through legal codification (as in Turkey and Egypt) and of instrumental rationalization: professionalization of legal actors, differentiation of legal structures, and bureaucratization of legal administration. However, the direction of this rationalization has been strongly influenced by values that are historically “Western” in origin... values thus influence the shape of the legal changes that are characterized as rational in our model.³¹

³¹ Sterling and Moore 1987, p. 82

However, the characteristics of bureaucracy, mentioned above, led Weber to assume bureaucratic organizations to be independent institutions, and to ignore the existence of forces that are located within and outside them. For him bureaucratization is considered a process that prescribes to the bureaucrat an essentially fixed route. He erroneously supposes "that precise obedience would become habitual and the basis of all order."³² He does not discuss the role of bureaucrats and participants in social organizations and the fact that their interests and goals are not necessarily the same as those of the organizations. He also ignores the role of environmental forces outside bureaucratic organizations - political and cultural forces - and their influence on bureaucrats. These internal and external forces could have crucial influence on organizational goals. Bureaucrats do engage in struggles which "arise within organizations over interests, values... Goals, policies, rules, procedure, task, and so forth."³³ Consequently it can be said that the autonomy of organizations can never be considered as absolute; rather it is limited and relative.

Although Weber did not talk of the prison as an example of a bureaucratic system, it shows bureaucratization, rationalization and professionalization par excellent in the institution of punishment in modern societies. The development of penal practice as bureaucratic system in modern societies, particularly the USA, began primarily as a religious idea. Religious conceptions of self-reflection, repentance, and moral rehabilitation played an important role in the penitentiary movement of the nineteenth

³² Rudolph and Rodolp, 1979 p. 207

³³ Ibid p. 209

century. The role of religious ideas in developing milder forms of punishment³⁴ and developing the penitentiary system is undeniable.

"In theory, the penitentiary facilitated intensive self-reflection through "cellular isolation" separating prisoners from each other, as well as the outside world coupled with equally intensive religious instruction. Practically, however, it became a pioneer in a new regime of harsh penal discipline."³⁵

Through these penitentiary systems designed to promote the moral reform of inmates "by imposing a regimen of silent, solitary self-reflection, the penitentiary became the purest example of the "Pennsylvania plan" of "cellular isolation."³⁶

The institutions of the criminal justice system in modern societies can be divided in to three main categories: lawmakers, courts, and enforcement penal institutions. The first class, particularly in democratic countries, cannot be free of social responses and influences, because laws or political decisions can, at least partly, be seen as an expression or translation of social demands. Categories of crime and punishment are part of everyday life in modern societies, and the demand for punishment for serious crime and the rising rate of crime visible phenomena. Politicians are not free of these public pressures. A historical correlation between the structural transformation of society and the shifting of penal policy- post - French revolution 1789, Islamic revolution 1979 and

³⁴Savelsberg 2004, p. 397-8

³⁵ See; <http://www.amphilsoc.org/library/mole/s/statepen.htm#additionalinfo>

³⁶ See; <http://www.amphilsoc.org/library/mole/s/statepen.htm>

contemporary American criminal justice, for example, shows that impact of cultural and political forces on the criminal justice system. Professional and managerial agencies play a role in the process of legislation modifying these social forces.

Despite the fact that penal systems are founded upon the law, the organizational and professional impact on criminal courts is undeniable. Criminal courts are bureaucratically organised and judges and prosecutors can be classified as professional groups. Thus, bureaucratic principles and professional requirements can be applied here as well. Yet "even with carefully drawn standards sentencing will vary across courts which vary in their formal and informal organization."³⁷ However, the existence of a bureaucratic system and professional staff in the criminal justice system, particularly in criminal investigation, prosecution and policing could, to a certain extent, immunize the penal system against collective sentiments.

Notwithstanding the above argument, modern courts, more than at any other time, have been made into a public spectacle and have become an area for the expression of moral sentiments through the role of the press and mass media. Nowadays public opinions is no less sensitive about processes of conviction and sentencing than before. The scientific and managerial approach, which conceives of punishment in technical terms, as a question of social ill, or risk-management, is not fully accepted by this division of criminal justice. This is because for the courts these technical approaches do

³⁷ Dixon 1995, p. 1192. An extensive investigation which has examined sentencing outcomes in 73 countries in Minnesota to appraise three theoretical approaches to sentencing. 1-The formal legal theory 2-Substantive political theory 3-Organizational maintenance theory and concluded that: 'the effects of plea are conditioned by the level of bureaucratization in courts'(see Ibid., p. 1157)

not give any sign of 'the social condemnation that crimes should receive.'³⁸ Moreover, the dramas and rituals that are:

regularly produced today in courtrooms, newspaper editorial pages, the Internet, the floors of Congress and state legislatures and on television – tend to reinforce common-sense categories (e.g. worthy/unworthy, legitimate authority/illegitimate authority) that underpin the dominant moral order. In short, penal dramas do express and reinforce collective sentiments.³⁹

With respect to the third class, the autonomy of the criminal justice system is more tangible. An extensive network of institutions, ranks of experts and the establishment of prison as the principal form of punishment fundamentally alter the performance of punishment. Prisons became the cradle of criminology in the nineteenth century and attracted the attention of scientific knowledge experts such as psychologists. Gradually, professional groups "and experts continue to increase their monopolistic reach"⁴⁰ while they were "not directly nor necessarily acting in the best interests of the state."⁴¹ They follow their professional ethics and managerial goals in regards to criminal treatment, solving social problems, and so on. Thus, there are fewer places for the manifestation of social sentiments, because they contradict professional and managerial demands.

³⁸ Garland 1990, p. 185

³⁹ Page Op. cit p. 361

⁴⁰ Cohen 1985, p. 164

⁴¹ Ibid

I-3 Rationalization

Rationalization is the most general, but also the most the most crucial, element in Weber's sociological theory and his theory of historical development. It is a general pattern which according to Weber originally developed in the culture of western countries. Weber traces this developmental line in the music, architecture, universities, law, science, and political organizations of occidental civilization. He attempts to discover the context and origin of rational organization and the calculated administration of economic activities to provide "a valid explanation for the particularity... western rationalisation."⁴²

As Schluchter argues, "For Weber "rationalism of world mastery" was the product of a long ethical, religious and institutional development paralleling the "disenchantment" of the world."⁴³ Weber's theory of rationality corresponds to a process of disenchantment in the world and the displacement of mystical procedures by rational systems of thought and practice. The modern world freed itself from the superstitious. What in earlier ages was managed by mystical and magical forces is now rational, and becomes calculable and predictable. Secularization is another aspect of Weber's theory of rationality, causing the weakening of traditional and religious moral authority in favour of scientific rationality. From a technical point of view, rationalization is a process of the application of knowledge to arrive at a desired end. It is characteristic of a new style of life, a product of scientific specialisation and "technical differentiation,

⁴² Schluchter 1985, p. 12

⁴³ Ibid., p. XV

peculiar to western culture."⁴⁴ The notion of rationality in this aspect is related to greater efficiency, productivity, distribution of goods and services and so on.

For Weber, the worldly asceticism of Calvin, in addition to rational conduct on the basis of an idea of the fixed 'calling', provides an "ethical justification of the modern specialized division of labour."⁴⁵ Providential interpretation of profit making, for Weber, is not merely the essential element of the spirit of capitalism, but of all modern rational culture.

However, Weber's discussion of the relationship between religious values and capitalism has seemingly been overshadowed by his discussion of the sociology of law in *Economy and Society*, because sociologists give little significance to this argument.

⁴⁴ Freund 1970, p. 18

⁴⁵ Ibid., p. 163 For Weber the doctrine of predestination is the most significant part of the Calvinist world view. For Calvin a "small portion of men are chosen for eternal grace."¹ Feelings of unprecedented inner loneliness surround individuals. Each man must follow his own path to eternal salvation, without assistance. No church, priest, or even God can help him, "for even Christ has died only for the elect."² All magical and sacramental forces are considered as superstition: "This negative attitude towards all sensuous culture... shows a very fundamental element of Puritanism."³ The time during which magical forces and superstitious beliefs were eliminated from the world was, for Weber, an important historical process in the development of religion. For Calvin lack of certainty of eternal grace is a sign of lack of faith, and worldly activities are necessary for the achievement of confidence. All worldly activities are → → directed solely to the glory of God and God "requires social achievement of the Christian."⁴ This idea eliminates all mystical types of Christian religion. Fulfilment of these daily tasks can "assume a peculiarly objective and impersonal character, that of service in the interest of the rational organization of our social environment."⁵ For all See: Ibid p.103- 1099

In considering Baxter's writing on puritan ethics, Weber examines another aspect of Puritanism. Wealth, by itself, is considered a great danger, and morally suspect, because it leads to laziness and relaxation. What increases the glory of God is not leisure and pleasure - "only activity serves to increase the glory of God."⁵ Nothing is more pleasing to God than daily work and the performance of his decrees through a fixed daily work. The wasting of time is the worst sin because it is a loss of labour for the glory of God. Working hard in a calling, and labour in itself came to be considered "the end of life, ordained as such by God."⁵ For Baxter, even for the wealthy there is no exemption from this absolute duty. According to him it is a religious duty and an ethical principle. "Outside a well-marked calling the accomplishments of a man are only casual and irregular... therefore is a certain calling the best for every one."⁶ It is not just labour that pleases God but rational labour in a fixed calling with the purpose of profitableness. The opportunity of gainful calling is a gift of God that should be used by men.

⁶ Ibid., p.161

Modern law for Weber can be considered as an outcome of the general process of rationalization. It is a "rational and technical historical apparatus."⁴⁶ In his sociology of law, the trajectory of law in western countries is viewed as an evolution from patrimonial, traditional and personal forms to a formal-rational and bureaucratic type.

I-4 Max Weber, legal rationality and punishment

The importance of law for Weber is in one way similar to Durkheim because he also sees law as "an explanatory variable in understanding society."⁴⁷ For Weber the developmental history of law is a theoretical model for the clarification of socio-historical change. Every society is accorded a certain legal form in its developmental trajectory. He also insists that the modern legal system operates independently of social, political and moral forces. Weber's "approach to sociology of law is through an analysis of the "internal" forms of legal thought, rather than the actual content of law, and of efficacy of law in assuring order and predictability ("calculability") in social behaviour."⁴⁸

Weber identifies two major classifications in the administration of justice: rational/irrational and formal/substantive. He classifies both lawmaking and law finding "in terms of whether they are rational or irrational either procedural (formal) or substantive."⁴⁹ Rationality or irrationality, according to Weber, refers to the presence or absence of general and predictable norms of judgement in particular cases. The norms to

⁴⁶ Weber 1954 p. 321

⁴⁷ Sterling 1987, p. 67

⁴⁸ Ibid., p. 67-68

⁴⁹ Schluchter 1981, p. 87

“which substantive rationality accords predominance include ethical imperatives, utilitarian, and other expediential rules, and political maxims,”⁵⁰ considered as natural law, which influenced “the codification of the pre-Revolutionary nationalistic modern state, as well as the revolutionary codification.”⁵¹ Rational formal justice, for him, is based on supreme, calculable, general abstract rules, originating in Roman law and developed by rationally trained experts in universities. The enacted legal code, produced through correct procedure at official institutions, can be seen as the embodiment, in Weber’s terms, of rational-formal law.

Law is formally irrational when it is associated with “means, which cannot be controlled by the intellect,”⁵² and supernatural forces such as prophetic orders or revelations determine decisions. There is no general or standard rule for decision-making, and sentencing is unpredictable. This is charismatic law, which he views as primitive or pre-modern law. The law is substantively irrational when decision-making is not based on general or particular norms, but “influenced by concrete factors of the case as evaluated upon an ethical, emotional or political basis.”⁵³ It is characterised as traditional law. *Kadi-justice* is a famous form that Weber cited as example of this kind of law.

Weber’s typology of formal and substantive law is concerned with the level of autonomy of a legal system from social forces. This categorization “concerns the extent

⁵⁰ Ibid., p. 957

⁵¹ Weber 1954, p. 873

⁵² Ibid., p. 656

⁵³ Ibid., p. 656

to which legal rules and procedures are generated from within legal system, as opposed to external criteria such as religious, ethical or political values.”⁵⁴ The more social conflicts are solved by legal procedures, the more a system is “formal”; and the greater the reliance on social and extralegal contexts, the more a system can be described as “substantive”. Rationalization of a legal system for Weber means generalization and institutionalization of both lawmaking and law finding in a system in which there is no place for the irrationality of individual case and irrational adjudication. Resort to outside moral and political systems for decision-making is in contrast with calculability and thus formal rationality of the legal system. For him “the use of “discretion” in the legal system would be contrary to the movement towards an autonomous legal system.”⁵⁵

Weber believes in a kind of self-institutionalization process through, which legal systems in modern society became independent and legal rules no longer looked to external social, political and cultural forces. The substantive and procedural rules of the legal system are preferred to ethical or social considerations. “The legal system abides by these rules despite cries of outrage from members of the community who want to see criminals sent to prison.”⁵⁶ For Weber, formal rational law legitimates itself, contrary to substantive rational law in which legal rules are derived from social structures outside the legal system, like religion and ethics. He suggests a sort of relative legal autonomy and a legal system also to “operate independently of the influence of power, political forces

⁵⁴ Ibid p. 72

⁵⁵ Sterling and More 1987, p. 76

⁵⁶ Ibid, p. 69

and ethics in society.”⁵⁷ For example, he describes the judge as an automaton: “the legal documents, together with the costs and fees, are dropped in at the top with the expectation that the judgement will emerge at the bottom, together with more or less sound arguments and apparatus accordingly whose functioning is by and large calculable or predictable.”⁵⁸

However, it can be said that Weber neglected the full interaction between social structures and the legal system. He overlooked the process of law making and law finding and their complicated legislative and executive functions. Legislation and the execution of law is a sophisticated process, which is affected by a combination of political, cultural, technical and economical factors. An automatic legal system endeavours to achieve social order by means of universality and objectivity of law, but maintaining social order requires society’s moral judgment. The development of generalized rules cannot fully separate “legal norms from the more general political and social norms existent in society.”⁵⁹ If we accept the relative independence of a current legal system, it is hard to explain how the initial formation of the legal system could be free from influences of social values.

Arguably Weber further neglects the goals and function of legal action, and the values this serves. But if we analysis his theory of rationality in terms of instrumental rationality, it is clear that a rational legal system could serve various social goals. Thus

⁵⁷ *ibid*, pp. 68-69

⁵⁸ Weber 1968, p. 1395

⁵⁹ Sterling and More 1987, p. 86

his theory of a formal legal system can have different interpretations in various cultural contexts. A useful example is the classification of uniform justice and the discretionary power of judges as a form of tension between formal and substantive rationality. The movement towards codification and positive law in nineteenth and twentieth centuries was aimed at the abolishing the arbitrary powers of judges, preventing cruel punishment. That movement was accompanied by the introduction of rehabilitation as an overarching idea of nineteenth and twentieth century penal policy. But generalization, objectification, predictability and equality before law as characteristics of Weberian formal rational legal system, as we will see in the next chapter, serve contemporary America's harsh penal practice. The mere coexistence of a standardized justice and discretionary justice within a legal system shows that Weberian formal rational legal system could instrumentally play various roles and there is essentially no permanent correlation or contradiction between this conception and social cultural values.

Unlike Durkheim Weber articulates institutional and material forms of the legal system rather than the contents, grounds and goals that they serve. He investigates visible and material manifestations of modernity, and ignores other socio- cultural grounds, and the content of these institutions. He endeavours to show the technical and procedural respects of modern culture that are not seen by other thinkers. He addresses rational, professional, institutional, economic and legal activities as new patterns of modern social life. Durkheim holistically investigates the permanent and essential cultural grounds of these institutional activities. According to this analysis, not only is there no essential inconsistency between Durkheimian and Weberian explanations of law but, Durkheim's

theory can even be considered as complementary to Weber's theory of law, rationality and bureaucracy. Thus, there is no essential contradiction between legal rationalization and social values. This instrumental understanding of rationality can be employed in Weber's theory of bureaucratization, professionalization and rationalization.

If we take the conception of 'sacred' as a central theme of religious beliefs, moreover, it can be claimed that there is a serious challenge for secularization thesis as describing decay of religious institutions and a shift in collective consciousness from religious to a technical, empirical and rational orientation. "Modern justifications may be expressed in terms of "rationalization" or "technocratic" vocabularies, but there is scant evidence suggesting that individuals in modern societies are less preoccupied with sacred conceptions that were our "primitive ancestors,"⁶⁰ These sacred social forces exist in the modern world and are honoured as in primitive societies. Sacred conceptions such as, individual dignity, national identity, collective goals, democracy, justice, equality are constituent elements of "civil religion". These sacred notions are highly respected in modern societies - "the deification of 'democracy' equality, justice, liberty, and progress is evident in their respective founding documents, civil celebrations, political speeches, and every day dialogue."⁶¹ Allegiance and obedience to the law and sovereignty of a centralized nation-state are modern symbols of organizational and structural gods. These facts suggest that modern social morality is hardly becoming secularized and less religious in character.

⁶⁰ Crippen 1988, p. 327

⁶¹ Ibid., p. 331

If we recall Durkheim's analysis of sacred and religion as a symbol of sacred common principles, an act is a crime when it strikes deeply held social beliefs. If we look at modern penal law in various legal systems we can trace the role played by sacred modern conceptions such as liberty, rights, equality, justice, individual dignity, sovereignty and law in the criminalization of individual behaviours and aggravation of punishment. This means that crimes typically are those activities that violate these modern sacred conceptions. A crime is an act against an individual's liberty, his dignity and rights, or against national sovereignty. The unity of crime and law breaking in modern penal culture can be analyzed in this regard.

However, In Weber's theory, every state is based on force: the "state is a human community that (successfully) claims the *monopoly of legitimate use of physical force*."

⁶² Weber recognises three main modes of legitimacy in the application and administration of force. First, authority based on traditional domination, which predominated in pre-modern societies and is founded on a belief in the sacredness of traditions and habitual orientations. Secondly, charismatic authority, which is founded on qualities of individual leadership. It is an extraordinary characteristic of a person, which comes from grace of God, heroism and so forth. Finally, "there is domination by virtue of 'legality' by virtue of the belief in the validity of legal statute and functional 'competence' based on rationally created rules - this domination as exercised by the modern servant of the state"⁶³ and bureaucratic organizations.

⁶² Weber 1997 p. 78

⁶³ Ibid., p. 79

In Weber's sociology of law, his categorization of legal thought is similar to his typology of political legitimacy: charismatic, traditional and formal-legal. Charismatic and traditional legitimacy are associated with irrationality (including formal and substantive) and substantive rationality. In these first two categories the legal system is connected with extra legal and cultural grounds. But in the third, where legitimacy is based on the formal legal system in modern societies, there can be a kind of "conflict between an inner and outer rationality, between the requirements of the legal system and requirements of its social surroundings."⁶⁴

However, Weber did not directly address the relationship between his theory of legality, rationality and political legitimacy on the one hand, and penal practice on the other. And notwithstanding the fact that analytically Durkheim and Weber have employed different terms in their theories of society and law, there is no essential contradiction between them. In pre-modern societies policies, including penal policies, are determined by supernatural forces like prophetic orders, revelation, ethical imperatives, emotions and politics. Government and political institutions are accorded a divine or quasi-divine character as a representative of a moral, traditional and religious society. As a result of the sacredness and religiosity of social values and the political structure, the violation of social morality and governmental decrees would necessitate a harsh and repressive penalty.

⁶⁴ Ibid., p. 79

However, the Weberian account of penal practice in modern societies differs from Durkheim. While for Durkheim punishment is and should be an account of social sentiments, notions such as rationalization, bureaucratization and specialisation indicate the separation of the institution of punishment from its social contexts and reduce the influence of social sentiments in the institutions of penal practice. The Weberian literature introduces a crucial and necessary outlook on penal practice, without which punishment in modern societies cannot be understood. Impersonality and dehumanisation are crucial characteristics of this perspective. From this standpoint, love, hate, and all irrational and emotional elements are eliminated from the official sphere of penal practice. The mere intervention of sciences like criminology, psychology and sociology, as well as their related expertises and bureaucratic institutions, significantly reduce the effects of emotional and irrational elements in the determination of penal policy.

The prisons, insane asylums, and reformatories, which were created by "Jacksonians in the decades follows 1820s"⁶⁵ in the United States, are pre-eminent examples of this general trend in the area of penal practice. The disenchantment with the view that origin of insanity rested with God's will, and the emergence of aetiology of the deviant, made changes to these correctional institutions. The differentiation and classification of criminals with a view to recognising the environmental or biological causes of their deviant behaviours essential to their rehabilitation, led to the creation of

⁶⁵ Rothman 1980, p. 4

various bodies of scientific knowledge. These conditions gradually led to the presence of experts such as physicians, psychiatrists and criminologists in correctional institutions.

The preceding analysis, comparing and contrasting Weber and Durkheim, accompanied by some distinctions, can equally be applied in the comparison of a Durkheimian and Foucauldian account of society and punishment. Foucault like Weber appears to reject the emotional, moral and religious character of punishment. Foucault's disciplinary theory is an account of the strategies of power, which cover all social policies and social institutions. He focuses on the prison as a crucial aspect of punishment in modern society, as part of the technology of power. His analysis of the prison constitutes the main theme of the next section.

II Foucault

There are some similarities between Weber and Foucault and it is important to note these. Indeed their similarities are such that, for some analysts of Foucault's perspective, there is serious doubt about "the creativity and originality of his thinking [because his work] in many ways reminds one of Max Weber."⁶⁶ It has been said that, at least part of his oeuvre can be considered as an extended and developed investigation of the components of Weber's theory: "the more important continuity between these two writers relates to their shared concern with the forces of discipline, bureaucracy, and rationalization, and the impact of these forces upon the social world and human relations."⁶⁷ As Dreyfus contends, "from Weber he (Foucault) inherits a concern with rationalization and objectification as the essential trends of modern culture."⁶⁸ Whilst Foucault starts from quite a different set of interests from Weber, "his entire work can be read as a series of essays on the emergence of specific rationalities in a number of central spheres of modern society."⁶⁹ It can be argued that Weber's idea of reaching desired ends through scientific means is developed by Foucault in his analysis of power-knowledge relations. In particular, Foucault explicates how the human sciences are applied as an instrument of power and subjection of body: "he (Foucault) is constantly interested in the social processes through which rationality is constructed and applied to the human subject, in order to make it the object of possible forms of knowledge."⁷⁰

⁶⁶ Smart B 2002, p. VIII

⁶⁷ Garland 1990a, p. 177

⁶⁸ Foucault 1983, p. 167

⁶⁹ Smart 2002, p. VIII

⁷⁰ Ibid., p. IX

Moreover, shifting attention from traditional and emotional social action is seen by both Foucault and Weber as a characteristic of modern society. For both, despite their differences, punishment has been transformed from socially expressive and morally charged practices to an increasingly bureaucratized, professionalized and passionless form of practice.

However, it should be emphasised that, despite similarities and shared concerns, their differences are such that one could hardly consider Foucault as Weberian. Unlike Foucault, Weber distinguished political and bureaucratic institutions. For Weber, bureaucratic organizations their characteristics, their functions and their relationship with political establishments are regarded as crucial issue of his project. But investigation of these political and bureaucratic organizations is not prime project of Foucault's studies. According to Foucault power is an omnipresent phenomenon which can operate through these and other institution. For him, power is a set of methods to increase subjection and efficiency in social control.

As previously mentioned, according to Weber the process of rationalisation is a general trend in western societies: "rationalism is a historical concept which covers a whole world of different things."⁷¹ Foucault's idea is not necessarily an evolutionary theory and, unlike Weber, rationalism is not placed at the heart of his investigation. Foucault believed "one must confine one's use of this word [rationalization] to an

⁷¹ Weber 1992, p. 78

instrumental and relative meaning.”⁷² Weber investigated the historical processes of government and legitimacy in various epochs, while Foucault’s exploration cannot essentially be considered as a fully historical study. As Foucault stated: “my books aren’t treatises in philosophical fragments put to work in a historical field of problems.”⁷³

Moreover, as we will see below, what is analysed by Foucault as mechanisms of individualization and the microphysics of power cannot be found in Weber’s writings. Foucault extended and complemented these concepts, by adding a “macro - physical analysis of practices whose focus is the administration not of individuals but populations. Practices rather than institutions remain the primary objects of the inquiry.”⁷⁴ In this respect he studied strategies and programmes that address individuals and populations as problems. As a result of this brief discussion, Foucault’s following statement seems reasonable: “I don’t think I am a Weberian, since my basic preoccupation isn’t rationality considered as an anthropological invariant.”⁷⁵

However, returning to the main argument, if there are distinctions between Foucault and Weber, it is difficult to point to similarities between Foucault and Durkheim’s analysis of social institutions. For example, there is no sign of Foucault’s sociological analysis of power and punishment in Durkheim’s expressive theory of punishment. For Foucault, Durkheim’s perspective of punishment as an index of society is derived from his holistic sociology, in which he studied only general forms of society

⁷² Burchell, Gordon and Miller, 1991, p. 79

⁷³ Ibid., p. 74

⁷⁴ Lash & Whimster 1987, p. 297

⁷⁵ Burchell et al Ibid p. 78-79

and saw a direct relationship between social values and penal policies. While for Durkheim punishment is an expression of social and cultural ideals, for Foucault the process of penal practice should be viewed, historically, as the tactics of power.

II- 1 Foucault and transformations of punishment

Foucault began his elaborate historical study of punishment with transformations in techniques of punishment in the period of 1750-1820. Foucault investigated the history of punishment as a genealogy of power, tracing this technology of power in both classical and modern forms of penal practice. For Foucault, the theatrical spectacle of punishment and reproduction of crime's scene through executions in the eighteenth century was a process of reviving and annulling the crime before the eyes of all. Attaching a placard to the back of the guilty as a sign of his crime, the declaration of his sentence at the foot of the scaffold, the confession of the condemned man in front of the public, performance of the execution and the exhibition of the "corpse of the condemned man at the scene of his crime,"⁷⁶ were components of that process. "Justice had the crime re-enacted before the eyes of all, publishing it in its truth and at the same time annulling it in the death of the guilty man."⁷⁷

The slowness of the ritual of torture and execution, the suffering and cries of the guilty man, the waiting for a decree of mercy in front of the scaffold, for Foucault, are to be analysed simultaneously as both judicial and political process. "It [the public

⁷⁶ Ibid., p. 44

⁷⁷ Ibid

execution and its ritual] belongs, even in minor cases, to the ceremonies by which power is manifested.”⁷⁸ The guilty man must be punished intensively not because he injured somebody or damaged something or even broke the rules, but because he attacked the dignity of the sovereign. He has offended “him [the sovereign] personally, and since the law represents the will of the sovereign, it (the crime) attacks him physically, since the force of the law is the force of the prince.”⁷⁹ The intensity of punishment and inequality between crime and punishment, for Foucault, shows the presence of the sovereign’s power and active forces of revenge.

The presence of armed military forces around the scaffold is the embodiment of the king’s armed justice and his forces. For Foucault, the huge ritual surrounding public executions is not merely the action of justice, but is a theatrical ceremony, revealing the relationship between the forces of power and law. From Foucault’s perspective, there is no connection between classical punishment and social structures. Guilty people are considered as rebellious and hostile which calls for vengeance. There is not fundamental difference between an act of disobedience and rebellion. It is civil war, which must lead to the triumph of power. This victory must be visible and manifested through the body of the condemned

Closer attention shows that in this there is no significant difference between Foucault and Durkheim in their analysis of penal practice in the classical era. They deliver a similar account of the intensity of punishment, symbolic rituals, theatrical

⁷⁸ Ibid., p. 46

⁷⁹ Ibid., p. 47

ceremonies, lessons for others, and so forth. However, Foucault replaces the collective consciousness of Durkheim's theory with the will of sovereign power. Both of them talk of an inequality between crime and punishment. For them, there are superior forces that react forcefully to every attack on superior and honoured issues in society. For Durkheim these sacred matters can be called sovereignty or power, as well, but, for him, the superior power that is embodied in the legal system is only the symbol of social and moral forces in society. Government is the representative of social sentiments in the application of punishment, although this delegation is not constantly real or direct. However, as we will see in this chapter, Durkheimian and Foucauldian analyses of penal practice in the modern era are more divergent.

Foucault's analysis of the penal transformation from the classical to modern era is complex. This transition, and the appearance of novel forms of penal practice, should be seen as new tactics of the technology of power, disguised as humanitarian or reformist styles of punishment. Tracing this development, Foucault describes how theatrical and corporal forms of punishment gave way to gentler forms of punishment. As he notes, at the end of the eighteenth century public executions were no longer a source of deterrence and order. Ignoring the role of social structures like religion and culture in the transformation of punishment Foucault insists that it was power considerations that eventually gave rise to enduring the public tortures and executions of the classical era. For Foucault it is this fundamental framework that can explain diminution of the cruel penal practice and emergence of a more humanized form of punishment from the end of the eighteenth century onwards.

Foucault does not explicitly or implicitly specify how and why “the crowds came to mock the authorities and to transform the condemned man into a popular hero.”⁸⁰ For him, the study of penal practice should not be seen through the evolution of legislation because it “would run the risk of allowing a change in the collective sensibility, an increase in humanization.”⁸¹ For him, Durkheim’s perspective on the decrease severity of punishment as a general trend in penal processes is derived from his mistakenly “studying only the general social forms”⁸² while these processes “are rather one of the new tactics of power”.⁸³

II-2 Prison

Foucault selected the institution of the prison as the object of his exploration. His work on the prison and the disciplinary approach to punishment transformed the way social scientists conceived of penal practices. Foucault termed *Discipline and Punishment* as his first book “not because it was literally the first, but evidently because he thought it his best, the one that most fully embodied his theory.”⁸⁴ Elsewhere he asserted that “I don’t mean to suggest that the prison was the essential core of the entire penal system,”⁸⁵ and that it is possible to study penal history through paths other than the

⁸⁰ Garland 1990a, p. 141

⁸¹ Foucault 1977, p. 23

⁸² Ibid., p. 23

⁸³ Ibid., p. 23

⁸⁴ Fred, 2000, p. 125

⁸⁵ Brucshell, *et al* 1991, p. 74

history of the prison. But in *Discipline and Punish* he takes the prison as the axis of his analysis of punishment to “answer the question; how does one punish”?⁸⁶

In the eighteenth century new disciplinary projects were experienced in clinics, army barracks, monasteries and schools. The main object of these projects was the body, which could be trained, manipulated and improved. Correctionalist institutions developed to fulfil the requirements of reformist programmes. They were no longer punitive establishments. The inmates were supervised in prisons by a strict schedule. Sleeping, waking, eating, exercising, training and other routine activities of prisoners were under permanent surveillance. Individualization, classification of inmates, codification of time and space, movements and measured treatment were applied to control and transform the individual. These methods, which made possible the meticulous operations of the body, “assured the constant subjection of its forces and imposed upon them a relation of docility-utility, were called disciplines”.⁸⁷

This disciplinary approach was methodologically totally different from slavery and vassalage. The latter system was founded on a relation of possession of bodies and their products, while disciplinary programs did not just aim at improving the body’s ability nor at the increasing of its subjugation, “but at the formation of a relation that in the mechanism itself makes it more obedient as it becomes more useful, and conversely.”⁸⁸

⁸⁶ Ibid., p. 74

⁸⁷ Foucault 1991, p. 137

⁸⁸ Ibid., p. 138

According to Foucault in the nineteenth century, the policy of punishment changed. This no longer dispensed costly violent methods of penal practice. Instead, the object of the new policy was to influence the individual's mind and soul. Indeed the soul is a product of the policy of coercion that acts upon the body through the disciplinary machine. The principal function of these disciplinary techniques is to increase "the mastery of each individual over his own body."⁸⁹ As mentioned above, from the eighteenth century onwards punishment no longer addressed itself to the body as a site for the infliction of pain. As Foucault argues, "The expiation that once rained down upon the body must be replaced by the punishment that acts in depth on the heart, the thoughts, the will, the inclination."⁹⁰

Moreover normalization was a new method of sanctioning in modern societies. What reformers considered as a rehabilitative and correctional system or, as Foucault termed it, "the gentle way in punishment,"⁹¹ was according to Foucault, a system of standardization. This method included instruments of "knowing how the individual performs, watching his movements, assessing his behaviour, and measuring it against rule."⁹² The idea of the panopticon,⁹³ which he borrowed from Bentham, provided one of

⁸⁹ Ibid., p. 137

⁹⁰ Ibid., p. 16

⁹¹ Foucault. Ibid., p. 104

⁹² Garland Op. cit p. 145

⁹³ Bentham's Panopticon is the architectural figure of this composition. We know the principle on which it was based: at the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheral building is divided into cells, each of which extends the whole width of the building; they have two windows, one on the inside, corresponding to the windows of the tower; the other, on the outside, allows the light to cross the cell from one end to the other. All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell a

the best means to analyse and explain this idea of surveillance, supervision and regulated conduct.

The role of penal labour in prison is crucial, not because of its economic value, but rather by virtue of its influence on the human 'mechanism'. For Foucault penal labour should be analysed as a process of order and regularity. It prevents inmates from engaging in disorderly activities and imposes power and supervision over them. This method gives the inmates habitual discipline and obedience without the use of violent repression. Through penal labour the prison became "a machine whose convict-workers are both the cogs and the products; it occupies them continually, with the sole aim of filling their moments."⁹⁴ Thus, the physical excitement of the body and the engagement of the mind to particular objects gives rise to calmness of the soul.

The final section of *Discipline and Punish* is entitled 'the carceral'. According to Foucault, the official opening of Mettray (a reformatory for youth) marked the completion of the carceral system. This was not only because it was the utmost disciplinary system and the site for the all-powerful controlling technologies of conduct, but also because "in it were to be found cloister, prison, school, regiment."⁹⁵ And not just because techniques of surveillance, knowing, training, and transformation were operated in these institutions, but also, for the particular reason that it was not simply a prison.

madman, a patient, a condemned man, a worker or a schoolboy. By the effect of backlighting, one can observe from the tower, standing out precisely against the light, the small captive shadows in the cells of the periphery. They are like so many cages, so many small theatres, in which each actor is alone, perfectly individualized and constantly visible. Ibid, p.200

⁹⁴ Ibid., p. 242

⁹⁵ Ibid., p. 293

Mettray was an establishment which received problem cases, offenders and non-offenders, who were placed under the same system. This “carceral archipelago” is a symbol, which shows how the punitive carceral-based system began to cover the other spheres. For Foucault this huge carceral net contains a disciplinary field that operates throughout society. “A subtle, graduated carceral net, with compact institutions, but also separate and diffused methods, assumed responsibility for arbitrary, widespread, badly integrated confinement of the classical age.”⁹⁶ For Foucault, the frontier between disciplinary and punitive institutions is to vanish in modern society, establishing a great carceral continuum that brings penitentiary methods to other disciplines. According to Foucault those methods cover all anomalies, irregularities and deviations.

Foucault enumerates other social institutions, like agricultural sections belonging to the central prisons, colonies for the poor, and almshouses for female offenders or poor girls found in the hospital and lodging houses all of which were all managed by all or some of the carceral methods and disciplinary mechanisms. These institutions operated throughout society. As he argued “the carceral archipelago transported this technique from the penal institution to the entire society.”⁹⁷ The principle of supervision and regulation covers the whole body of society and extends from the lowest degree of irregularity to the most serious of crimes. The reformatory, school, prison, and orphanage are part of the carceral continuum, covering the whole range of methods from the correction of irregularities to the punishment of crime. As a result, a substantive link

⁹⁶ Ibid., p. 297

⁹⁷ Ibid., p. 298

exist between the least irregularity and the biggest crime, as "it was no longer the offence, the attack on the common interest, it was the departure from the norm, the anomaly"⁹⁸ that should be controlled.

In such a way of thinking punishment is part of a massive strategy of normalization. There is no a significant difference between punishing, curing and educating. It is a matter of degree, and punishment can be considered as an extension of those less coercive processes. Prison simply represents "an additional degree in the intensity of a mechanism that has continued to operate since the earliest forms of punishment."⁹⁹

The most important result of this extension of the carceral continuum is that system, legal punishment becomes more legitimate and tolerable. The great carceral system extended throughout the legal sphere of justice. The prison, as a model of justice, is transmitted throughout the network of the carceral system. Disciplinary institutions imitate its legal rules giving them a kind of official sanction. The disciplinary power which operates in these institutions does not seem arbitrary, because they apply mechanisms of justice at a lower level and with less intensity: "carceral continuity and fusion of the prison-form make it possible to legalize, or in any case to legitimate disciplinary powers, which thus avoids any element of excess or abuse it may entail."¹⁰⁰

⁹⁸ Ibid., p. 299

⁹⁹ Ibid., p. 302

¹⁰⁰ Ibid., p. 302

On the other hand, the skilful gradation of the instruments of disciplinary mechanisms in the carceral pyramid provides a context in which inflicting penal practices “appear to be free of all excess and all violence,”¹⁰¹ because it is a fraction of what has been done previously. There is no significant difference between the rehabilitative institution “where one is taken in order to avoid prison”¹⁰² and the prison that one has been sent to after committing a certain crime. The universality of the carceral, which operates at every level of social body, in addition to mingling “the art of rehabilitation and right to punish, lowers the level of adoption of punishment as something natural and acceptable.”¹⁰³ Moreover, Foucault explicates another answer to the question of how punishment became natural and acceptable and how it found new foundation, in particular, after the French revolution. For him the answer was to be found in the theory of contract, “by the fiction of a juridical subject given to others the power to exercise over him the right that he himself possesses over them.”¹⁰⁴

There are other important results for the new form of punishment. According to Foucault, the predilection of judges for medicine, psychology, and criminology on the one hand, and the extension of judging and normalizing to other groups like teachers, doctors and social workers on the other, shows that the nature of power exercised by judges has changed. Criminal justice becomes a combination of principles of legality and principles of normalization. This normative power which is “borne along by the omnipresence of the mechanisms of discipline, basing itself on all the carceral

¹⁰¹ Ibid., p. 302

¹⁰² Ibid

¹⁰³ Foucault 1975 translated to Farsi 2003 p. 381

¹⁰⁴ Ibid., p. 303

apparatuses, has become one of the major functions of our society.”¹⁰⁵ This argument offers a new perspective on the sociology of punishment. This “powerful perspective”¹⁰⁶ gives a control orientation model to the nature of modern punishment in contrast with an emotive, expressive or punitive model. Foucault’s disciplinary model of punishment is an account of new trends in which a,

social control system served the requirements of the emerging capitalist order for continual repression [and simultaneously] continued to mystify every one (including the reformers themselves) into thinking these changes were fair, humane and progressive.¹⁰⁷

For Foucault, there is no room for humanitarian aims in the changing of punishment or the failed stories of punishment and the prison. As will be discussed, Foucault believed that the pre-determined goals of the prison system have been continuously successful.

II-3 Foucault and conceptions of power-knowledge

As noted above Foucault begins his major work with a contrast between the spectacle of public torture, the exhibition of execution and the schematized timetable in a disciplinary institution. “He contrasts traditional, ritual, costly, violent forms of power

¹⁰⁵ Ibid., p. 304

¹⁰⁶ Garland 1990 p. 3

¹⁰⁷ Cohen 1994, p. 22

with panopticism, a subtle, calculated technology and economy of subjection.”¹⁰⁸ This clearly demarcated change in penal styles has to be seen not as quantitative change, a leniency of penalty and a decrease in the intensity of punishment, but as a qualitative shift in methods of punishment. Foucault’s thinking about punishment can be understood within his universal framework of rationality and techniques of power in modern societies. For him, the growth of freedom and democracy during the Enlightenment, the efforts of reformers in penal practice, and the revolution of science, particularly human science, all should be viewed as part of the modern strategies of power.

For Foucault power is present and operates everywhere, it is the social skin which covers all individuals. There are no margins “for those who break with the system to gambol in.”¹⁰⁹ Escaping from power is not possible, because there is no sphere where power has no play. Power relations are entangled with other social relations like family, production, sexuality and so on. Moreover, “these relations do not take the sole form of prohibition and punishment, but are of multiple forms.”¹¹⁰

Foucault’s perspective on power is different from the conventional conception of power, which is usually opposed to freedom. Power for him is not a matter of political ideologies or the exercise of authority by political institutions like parliament. It cannot be considered as property which belongs to individuals or political institutions; in fact Foucault’s study of power is not based on investigations of the state. He does not discuss

¹⁰⁸ Kaplan Martha 1995 p. 85

¹⁰⁹ Foucault, 1977 p. 141

¹¹⁰ Ibid., p. 142

the resources, elements and forces of the state. Strategies of power for him are not a plan that is made by a particular institution or decision maker. In this regard he was not concerned with the coherent domination of an individual, "group or class over others."¹¹¹

Power is a series of actions and practices that are performed in various socio-political institutions and other social relations. The object of these strategies and practices is the body. To analyse the political investment of body, he employ the term the 'body politic,' which he considers

as a set of material elements and techniques that serve as weapons, relays, communication routes and supports for the power and knowledge relations that invest human bodies and subject them by turning them into objects of knowledge.¹¹²

This is what Foucault termed the micro-physics of power. For him thinking of power is thinking "of its capillary form of existence, the point where power reaches into the very grain of individuals, touches their bodies and inserts itself into their actions and attitudes, their discourses, learning process and every day lives."¹¹³

There is no clear difference and distance between who exercises the power and who is dominated: "power must be analysed as something which circulates, or rather as

¹¹¹ Foucault 1980, p. 39

¹¹² Foucault 1977, p. 28

¹¹³ Ibid

something which only functions in the form of chain.”¹¹⁴ Power operates via networks of organizations and social relations. Individuals are not only the “effects of power”¹¹⁵ but also “the vehicles of power.”¹¹⁶ Power forges souls, desires and subjects, thus one should not have a hierarchical, descending analysis of power, but “one must rather conduct an ascending analysis of power.”¹¹⁷ In this analysis of power comes from below. For Foucault in a feudal regime individualization is ascending. “The more one possesses power or privilege, the more one is marked as individual by rituals, written accounts or visual reproduction.”¹¹⁸ But in a disciplinary regime, individualization is descending - “as power becomes more anonymous and more functional, those on whom it is exercised tend to be more strongly individualized.”¹¹⁹ Power is exercised not only over bodies but it is also enacted over the individual movement and gestures of the body. Practices of power lead to harmonization of these movements and attitudes, codification, categorization and continuous supervision.

Foucault’s concepts of individualization, supervision, observation and the application of sophisticated and subtle technologies in social institutions like punishment, are powerful insights. These also constitute techniques for reduction of the cost of power and increasing docility and utility. In the new form of social control, subjection is not obtained by physical force; it is applied through calculated, organized and technical apparatuses. Schools, clinics, factories, prisons and so on, in Foucauldian terms are to be

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ Ibid., p. 99

¹¹⁸ Foucault 1991, p. 192

¹¹⁹ Ibid., p. 193

seen as a part of a grand strategy of power. In this new trend power is applied at the lowest possible price, and the most expansive and efficient mode. It is quite different from the arbitrary and direct exercise of force. Political technology covered the body through the sophisticated techniques of knowledge.

This knowledge is not the same as knowledge of the functioning of the body. For Foucault "this knowledge and this mastery constitute what might be called the political technology of the body."¹²⁰ This technology is not systematically formulated to constitute a particular discourse. It is a collection of means and methods that cannot be placed in any *ad hoc* establishment or state foundation.

What the apparatuses and institutions operate is, in a sense, a microphysics of power, whose field of validity is situated in a sense between this great functioning and the bodies themselves without their materiality and their forces.¹²¹

From Foucault's standpoint, it is therefore barely possible to distinguish between power and knowledge. In the mastery of the body there is interaction between these two phenomena. It can be said that strategies of power are determined by scientific political technologies of the body. The history of human sciences and the history of penal law, as tactics of power, should not be studied as two separate, but overlapping, disciplines. which have some overlaps, but one rather should ask "whether they do not both derive

¹²⁰ Ibid., p. 26

¹²¹ Ibid., p. 26

from a single process. In short, make the technology of power the very principle both of the humanization of the penal system and of the knowledge of man."¹²²

From Foucault's perspective modern institutions invented a new context for the practice of assessment, supervision, observation and recording of the population to administer and manage them through education, health and the penal system. "This is the original matrix of the human and social science ... we might speak of social science as strategies of power designed to minimized the cost of power, to maximize its coverage."¹²³ For Foucault the transformation of individuality through a ritual mechanism changed to a scientific and disciplinary mechanism. "When the sciences of man become possible is the moment when a new technology of power and a new anatomy of the body were implemented."¹²⁴ Indeed it is not power, but rather the subject that is the main theme of his investigation. This subject is essentially constructed through external control of power over the body performed by omnipresent institutions throughout society. According to him this self-policing is an extension of the religious confessional in modern society.

The human sciences, then, are productions of particular models of power, which need observation, surveillance, examination, and an exact knowledge of humans and their conduct. The disciplines of criminology and psychiatry, for instance, can be understood in this context of power-knowledge relations. These sciences are significant modes of

¹²² Ibid p. 23

¹²³ O'Neill. 1986 p. 53

¹²⁴ Foucault 1991, p. 193

studying the human being and his individual and social behaviours. They are the outcomes of a close examination of internal and external forces in the conduct of human beings.

Later, in *The History of Sexuality*, Foucault extended his theory of power and distinguished for it another function, namely the administration of life. He asserted that leniency of punishment does not occur because of humanitarian feelings rather, the function of power is the proliferation and protection of life, and increasing life expectancy is part of this strategy. This strategy directly contradicts corporal punishment and the death penalty, for in such an analysis death is a limitation of power. When the role of power is sustaining, multiplying life, and putting life in order, how it can operate against health and life, in terms of corporal punishment and death penalty? If torture and the ritual of execution once strengthened the sovereign, today, 'death is power's limit.'¹²⁵

Eventually, Foucault formulated his theory as power over life, which evolved in two major patterns or two poles of development, which constitute a great network of relations. The first pole focused on the body as a machine:

its disciplining, the optimisation of its capabilities, the extortion of its forces, the parallel increase of its usefulness, and its docility, its integration into a system of efficient and economic controls, all this was ensured by the procedure of the power that characterised the disciplines: an *anatomo-politic of the human body*.

¹²⁵ Foucault 1991, p. 138

The second that formed somewhat later, focused on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagating, birth and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause this to vary. Their supervision was affected through an entire series of intervention and *regularity controls: a bio-politic of population*. The discipline of the body and regulations of the population constituted two poles around which the organization of power over life was deployed.¹²⁶

Power over life can have both negative and positive consequences. The former prevents individual from brutal and corporal punishment, in particular the death penalty, and the latter gives rise to a normative and disciplinary penal strategy.

Foucault demonstrated to a wide audience “the far-reaching sociological significance of punishment and kinds of insights, which might be gained from a close examination of its practices.”¹²⁷ His works which “are complex in thought and language”¹²⁸ opened up and developed new perspectives in analysing penal practice. His conceptions and descriptions of punishment now stand at the very heart of any comprehensive study of punishment. His perspective on the analysis of penal practice developed and strengthened the position of the sociology of punishment, and has had a tremendous impact on contemporary sociology and intellectual culture. His positive and

¹²⁶ Ibid., p. 139

¹²⁷ Garland 1990b, p. 2

¹²⁸ Male -Katkin Daniel 2003, p. 157

productive approach to power introduced a new framework of inquiry which covers all realms of life including, health, education, insurance, as well as the institution of punishment. He changed traditional and current ways of thinking about punishment and penal institutions. Thus, "To write today about punishment and classification without Foucault, is like talking about the unconscious without Freud."¹²⁹

Although punishment was not the sole object of Foucault's research, it is a remarkable example of the positive effects of institutional disciplinary mechanisms. He "regards punishment as a complex social function."¹³⁰ It works at directing strategies of power to make the body a useful force. But "the body becomes a useful force only if it is both a productive body and a subjected one."¹³¹ This subjection is not necessarily achieved by force, violent or ideological. The body needs to be known through a particular knowledge which Foucault called "the political technology of the body."¹³² According to Foucault this technology does not continuously have the same formulation, and is not located in any particular institutions or state establishment. As he stated, it is "diffuse, made up of bits and pieces, [and a separated collection of] tools or methods."¹³³ This technology is not systematic or uniform, but this does not mean that there are not coherent results. What institutions perform, in Foucault terms, is a "micro-physics of power."¹³⁴ This technology is a set of different tools and methods, accompanied by knowledge, which are used by institutions. Penal policy should be

¹²⁹ Cohen 1985, p. 10

¹³⁰ Foucault 1991, p. 23

¹³¹ Ibid., p. 26

¹³² Ibid., p. 26

¹³³ Ibid

¹³⁴ Ibid

considered as a technique of a comprehensive strategy of power: "[t]he form of law with its effects of prohibition needs to be resituated among a number of other non-juridical mechanisms."¹³⁵ Law is an instrument of economic and political management.

Foucault changed traditional and classical interpretations of punishment and introduced a new focus for the investigation of punishment. If his analysis is not a full account of penal practice, it is perhaps because the full study of punishment was not the leading aim of his investigation. He did not claim to have introduced a general theory of punishment, but thought of punishment as a set of practical methods of power-knowledge for managing individuals. For him, "penal policy is, in a profound sense, a political strategy of control."¹³⁶

A short comparison of Foucauldian and Durkheimian perspectives shows that they investigated punishment from different angles. As argued above, Foucault studied punishment in terms of power, while Durkheim's theme is the relation of punishment to social morality. Punishment in Durkheim's view is a sudden burst of flames, which erupts at the violation of respected social sentiments. For Durkheim, punishment is a direct account of collective sentiments and collective consciousness. It is a defensive reaction, which derives from an assault on sacred beliefs, which are deeply held. In contrast to Foucault, for Durkheim there is no strategy or pre-determined aim, as punishment spontaneously achieves its goals. Punishment can be graduated or directed by particular institutions but this does not change its essence. The nature of punishment

¹³⁵ Ibid

¹³⁶ Garland 1990b p. 5

is vengeance. Dynamism and energy of this punitive reaction is latent in the heart of the individual and of society, which during the release finds its function in the strengthening of social bonds.

For Durkheim, dimensions of social life are manifestations of 'social forces', 'collective consciousness', 'common social principles', 'social facts', 'social morality' and 'religion'. For Foucault, however, representations of social life are embodiments of power. If we consider Foucault's view of power as a non-personal issue which prevails throughout society, however, there is a kind of similarity between Foucault and Durkheim's theories of society. For Durkheim social forces lie beneath social dynamics. As we saw in chapter one, the idea of force was central in Durkheim's analysis of religion and society. The dynamics of power for Foucault play the same role as force for Durkheim.

For both Durkheim and Foucault, then, there are coercive forces that cover all social life. Any behaviour against these forces receives a kind of reaction. These reactions for both thinkers are functional. For Durkheim there are two kinds of social reaction, diffuse yet social reactions against any immorality, and organised responses to the crime. Power in Foucault's theory functions in a more complicated and institutionalized way. The outcome of punishment, for Foucault, is discipline both for individuals and society. If we consider discipline as a new form of culture in modern societies, then punishment can be understood as a functional institution in cultural terms, as we saw in Durkheim's theory of punishment. From this point of view punishment for

Foucault can be considered as an expression of the disciplinary requirements of modern culture.

Discipline is an essential demand of modern society. This is the religion of contemporary society. Discipline, law and order have become a sacred principle of modern societies. Discipline is an as undeniably sacred issue, without which social life and society as whole would be in danger. Discipline and social order in current societies are so important that, as we are witnessing in the war on terror, some modern states try to protect themselves against terrorism at the cost of scarificing individual liberties. For, it is the very basis of modern social life. Discipline in theory of Foucault plays a similar role to that which morality plays in the theory of Durkheim. If the invariability of punishment in Durkheim's theory is due to morality and social solidarity, the unavoidability of the penal institution for Foucault is due to discipline and power. In this way, the differences between the two thinkers can be viewed as less severe; more a matter of model and analytical form than of content. These dissimilarities become still less severe when we attend to Foucault's fascination with the role of religion in the Islamic Revolution of Iran in 1979.

III Foucault and Weber on Religion

These discussions of Weber and Foucault should not lead us to the conclusion that both absolutely ignore religion. As already mentioned, Foucault's theory of "discipline" and the Weberian idea of "rationality" can be regarded as new versions of civil religion in modern society. They are sacred principles of the modern world. However, traditional religious conceptions are so powerful that great thinkers like Foucault and Weber could not fully ignore them. Although they have not applied religion as an analytical instrument in their understanding of the modern world, they recognized the potential and actual power of religion in modern society.

III-1 Foucault and Religion

Foucault attempted to analyse religious ideas and practice in light of his general framework of power relations. In doing so he suggested that the dynamics of power "reveal the processes of 'subjectification' in a religious practice,"¹³⁷ such as disciplined religious ritual, or confession. For Foucault being the subject of others through control and dependence, and being subject of the self through conscience are both outcomes of a religious practice. Foucault's work on religious issues, however, cannot be considered as a "systematic treatment of religion"¹³⁸, as they constitute only a diverse and fragmented series of comments. However, "Foucault's analysis was radical enough and his interest sufficient to raise profound questions about religion and bring Christianity from a

¹³⁷ R. Carrette Jeremy 2000, p. 39

¹³⁸ Ibid., p.129

marginal excess to a central strategic theme of his work.”¹³⁹ Values and religious beliefs for him were seen as patterns of self-control in the administration of human conduct. He “contested the ‘spiritual’ in terms of the politics of experience, in terms of a corporality which challenges the very fabric of theological dualism.”¹⁴⁰

However, his approach to the Islamic Revolution of Iran in 1979 is more controversial and problematic.¹⁴¹ His writings on the Islamic revolution in Iran were published in Italian and French periodicals between the autumn of 1978 and spring of 1979.¹⁴² Publication of these articles resulted in harsh criticisms and damaged his reputation; he faced “negative, if not hostile, reactions”¹⁴³ while at the zenith of his scientific reputation. He went to Iran for first time in October 1978. “He landed in Tehran days after Black Friday, on which the army had opened fire on a crowd of demonstrators, killing an untold number.”¹⁴⁴ He was placed in the middle of a battlefield between religion and embodiments of modernity. As we will see in chapter five the Shah’s regime consisted of a developing bureaucracy, a well disciplined and equipped army, a flourishing economy, relatively modern prisons, and a powerful and well trained secret police and force. “The Iranian Revolution, in its attempt to overthrow the Shah,

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ He first visited Iran in September 1978 and then met with Khomeini at his exile residence outside Paris in October. He travelled to Iran for a second visit in November, when the revolutionary movement against the shah was reaching its zenith. During these two trips, Foucault was commissioned as a special correspondent of the leading Italian newspaper *Corriere Della Sera*, with his articles appearing on page one of that paper. He published other parts of his writings on Iran in French newspapers and journals, such as the daily *Le Monde* and the widely circulated leftist weekly *Nouvel Observateur*. Student activists translated at least one of his essays into Persian and posted it on the walls of Tehran University in the fall of 1978. Afary Janet and Anderson Kevin B. (2004)

¹⁴² Leczenberg 2004, p. 99

¹⁴³ Ibid., p. 101

¹⁴⁴ Macey, 1993, p. 408

revealed to Foucault the full force of religious phenomenon in holding the 'collective will', spirituality forming the key factor in the people's challenge to institutional power."¹⁴⁵ This historical movement, in particular the readiness of Iranian population to undertake any risks including imprisonment, torture, and sacrifice of the life was fascinating and disturbing for him, and he "tried to discover precisely what gave them this apparently totally unified, and heroic will."¹⁴⁶

Foucault was clearly involved in a dilemma regarding the presence of a charismatic and "mystical personality of Khomeini,"¹⁴⁷ and a "fearlessness and perfectly unified collective will,"¹⁴⁸ involving the Shi'at religion in mass mobilization and political struggle. He "gropes at length for an explanation"¹⁴⁹ of this phenomenon. At first, he sought to analyse this phenomenon as a resistance against state power or as "the most modern form of revolt-and the maddest,"¹⁵⁰ but this did not seem adequate.

Foucault conceptual tools and his strategy-based view of power could not extend to an analysis of the Iranian Revolution. His attention, therefore, gradually shifted toward the peculiar phenomena of religion and collective will. "He was convinced that he was seeing the emergence of a unified collective will."¹⁵¹ The Islamic Revolution had a profound impact on Foucault: what was mobilized was not a class struggle, and

¹⁴⁵ Foucault 1994, pp 379-401 in R. Varrette Jeremy, 2000, pp. 137 cited from Stauth, G. 1991, *Revolution in Spiritless Times: An Essay from Foucault's Enquiries into Iranian Revolution's* in Smart 1994, Vol, III pp. 379-401

¹⁴⁶ Leezenberg 2004, p. 102

¹⁴⁷ Ibid., p. 103

¹⁴⁸ Ibid

¹⁴⁹ Ibid

¹⁵⁰ Ibid

¹⁵¹ Macey 1993. p. 410

involved neither competing interests, nor the presence of a foreign enemy. There was no particular political party or disciplined institution to immobilize people. As he said, it was

a groundswell, with no vanguard, no party...it was the profoundly religious element that gave the Iranian revolution its unique force; religion had become a real force... the force that can make a whole people rise up, not only against a sovereign and his police, but against a whole regime, a whole way of life, a whole world.¹⁵²

For Foucault the ultimate motivation for the populations' heroic and self-sacrificing behavior was "to introduce or reintroduce, spiritual dimension into political life."¹⁵³

As such Foucault distinguishes another conceptual tool in his analysis of political and social life: 'political spirituality'. This dimension of social and political life for him was not something that belonged just to Iran and Islam, but rather he believed that "events in Iran recalled something the west had forgotten since the Renaissance and the great crises of Christianity, namely the possibility of a 'political spirituality'."¹⁵⁴ In response to some criticisms of his fascination with religion he argued that every possibility offered by Islam should not be rejected "in the name of the 'age-old reproach

¹⁵² Ibid

¹⁵³ Bernauer and Carrette, 2004, p. 106

¹⁵⁴ Macey David, 1993, p. 410

of fanaticism,”¹⁵⁵ and that every interest taken in Islam by a westerner should not be considered as “a sign of his scorn for it.”¹⁵⁶

One could disagree with Edward Said’s interpretation of Foucault’s shift as a general “disenchantment with the public sphere, [resulting in] his pursuit of ‘different kinds of pleasures,’ and ... his ‘unusual experience of excess’ that was the Iranian revolution.”¹⁵⁷ His outstanding shift of focus towards religion cannot be denied; he had witnessed religion as an ideology and a powerful cultural element actively involved in political struggle and mass mobilization. As such Foucault was forced to recognize that there were other social, cultural and political forces that must be considered in the analysis of social and political life.

In an open letter to the Mehdi Bazergan, the first prime Minister of Iran after Revolution, published in mid-April 1979,¹⁵⁸ Foucault took a universalistic position and argued for the essential obligations of government. He called the revolutionary trials and

¹⁵⁵ Ibid

¹⁵⁶ Ibid

see Bernauer James and Carrette Jeremy 2004, p. 106

He was aware of reactions and criticisms that would raise against him. Who he argued of political spirituality he wrote, “I can already hear some Frenchmen laughing, but I know they are wrong.”¹⁵⁶ ‘such statements were not acceptable to all Foucault’s readers. Even the loyal Muariac hold doubts about ‘spirituality’ where politics were concerned, but finally accepted that ‘politics without spirituality was equally dangerous.’

A particularly savage attack came from Claudie and Jacques Broycelle in the pages of *Le Matin*. They criticized Foucault for having become an apologist for ‘a spirituality which punishes and disciplines’, for an illegal regime. Foucault did not deign to reply, saying that he had always refused to take part in polemics, and that he objected to being asked to admit my mistakes.” Ibid

¹⁵⁷ Ibid. He continued that; ‘it was for the first time Foucault’s theories of impersonal, authorless activity had been visibly realized and he recoiled with understandable disillusion.

¹⁵⁸ Ibid., p. 110

summary executions “shameful.”¹⁵⁹ The morality he defended was not relativist, but anti-strategic. He said;

Be respectful when any singularity rises up, and intransigent when power infringes universals. A simple choice, but a difficult task, as one has to be at once slightly above history, watching for what is breaking or upsetting history, and slightly behind politics, watching unconditionally over anything that might limit politics. After all, that is my work I am neither the first, the last, nor the only one to do it. But I chose it.¹⁶⁰

Notwithstanding this shift it should be noted that his theory was not initially free from cultural conceptions. Although ‘truth’ is a complex notion in Foucault’s work,¹⁶¹ the crucial conception of the ‘regime of truth’ in Foucault is closely linked to the concept of culture. He argued that “each society has its regime of truth; that is, the types of discourse which it accepts and makes function as true.”¹⁶² He believed that the regime of truth in western countries is by and large the same as that which is different in the regime of truth in countries like China: “The concept of ‘regime of truth’ [in his theory], then seems to play much the same structural role that such notions as ‘culture’ or ‘world view’ play in more idealistically inclined authors.”¹⁶³

¹⁵⁹ Ibid

¹⁶⁰ Macey David, 1993, p. 411, see; ‘Inutile de se Soulever?’, *Le Monde*, 11 May 1979

¹⁶¹ R. Carrette Jeremy. 2000, p. 138

¹⁶² Bernauer and Carrette, 2004 p. 109

¹⁶³ Ibid

But, Foucault could not explain the persistence of torture in Iran, a state that (at least under the Pahlavi regime) “slavishly emulated the western regime of truth”, where need for torture has supposedly been replaced by more disciplinary ways of punishing, such as imprisonment.”¹⁶⁴ The persistence of non-disciplinary ways of punishing in the Iranian modern penal system can be considered as a sign of inadequacy of his theory of modernity and punishment.

In conclusion, it can be said that Foucault took religion as an effective cultural element that could play a crucial role in social and political life. But, the entirety of Foucault’s analysis of the institution of punishment emerged before his analytical shift toward religion and his structural investigation of society. Once he accepted concepts such as unified collective will, moral obligation and religion as notions that should be addressed sociologically, his understanding of penal practice may also have transformed, and become closer to what we saw from Durkheim in chapter one. However, such an analysis of punishment never appeared.

II-2 Weber and Religion

Weber’s trip to America in 1904 and his essay on “Churches and Sects in North America” “marked an important shift in Weber’s personal outlook.”¹⁶⁵ During the four months of his stay in the United States he tried to study various aspects of ordinary American life. The fruit of this activity according to Marianne Weber “was his discovery

¹⁶⁴ Bernauer and Carrette, 2004, p. 105

¹⁶⁵ Mariane Weber 1975, pp. 279-304

of moral kernel beneath America's objectified shell."¹⁶⁶ Weber himself wrote, "that the trip had widened his scholarly horizons."¹⁶⁷ He was highly stimulated by what he had seen: "It was a glimmer of a way out of the 'iron cage' of reified modern society,"¹⁶⁸ and a spirit of the world without spirit¹⁶⁹. He had found what had been lost in a tragic process of modernization and saw a possibility of breaking through the iron cage.

It is very important to note that for Max Weber modernization and secularization were not necessarily identical. He believed that "in modern societies the 'functions' of religion can be maintained even while the institution is altered"¹⁷⁰ As he wrote: "the tremendous flood of social structures which penetrates every nook and cranny of American life is constituted in accordance with schema of the [religious] 'sect.'"¹⁷¹ As we saw, for Weber, in one way secularization was shaped by particular cultural and religious values, but in the essay on 'Churches and Sects in North America' he provided a different understanding of secularization, and criticized the univocal rationalization thesis. That essay led him to focus on "an extensive elaboration of [the] decisive role played by religion in modernity."¹⁷² Indeed, conflict between religious values and ideas of modernity should be analyzed as a practical and historical event. It is "the fate of us Germans," Weber observed that the "religious revolution at that time [i.e., the Reformation] meant a development that favoured not the energy of the individual but

¹⁶⁶ Ibid., p. 901

¹⁶⁷ Ibid

¹⁶⁸ Ibid

¹⁶⁹ Foucault 1998, p. 211. The full statement of Foucault is: Iran spirit of the world without spirit

¹⁷⁰ Loader, Alexander 1985, p. 2.

¹⁷¹ Ibid. These functions can be fulfilled by secular groups, whose role is largely defined by the nature of the religious community from which they grew. Ibid

¹⁷² Ibid., p. 3

prestige of the 'office'." ¹⁷³ For him, in the USA, these religious forces resulted in a "radical idealism" which fostered individualism, flexibility and democracy.

From this point of view there is no essential contradiction between the concepts of rationalization, values and religion. As he wrote, "While the conduct of the sect members is rational, it is strongly tied to values." ¹⁷⁴ Although, in much of Weber's work, the rational act has anti-evaluative over tones, (in terms like objectivity), his vision of the sect introduced "a modern actor whose very rationality is rooted deeply in value standards [which] allows us to understand a non -utilitarian aspect in Weber's later discussion of rationality." ¹⁷⁵

Thus, if rationalization is technically the process of the application of knowledge to arrive at a desired end, and if we study rationalization in terms of instrumental rationality, then apparent tensions between religion and rationalization disappear, for what prevents technology, science, complex organizations, and professionals from serving traditional religious ideas? We will see in the case of America, and in particular Iran, how all manifestations of modernity, like institutionalization and technology are employed in the performance of traditional religious punishment.

However, as we saw above, Foucault's theory challenged the fundamental principles of modern western culture. He questioned liberal assumptions, originating in

¹⁷³ Ibid

¹⁷⁴ Ibid.

¹⁷⁵ Ibid., p. 3

the Enlightenment. As mentioned above, for him, the growth of freedom and democracy, the Enlightenment, all efforts of reformers in penal practices, the revolution of science, in particular human science, contributed to the sophisticated modern forms of social control and oppression. For Foucault the impacts of the process of civilisation and humanization on the content and form of punishment should be understood in this general framework of rationality and power. In the following section I will investigate impacts of these processes and changes on penal policy.

IV Punishment and culture

I want now to focus on cultural determinations of punishment, and how cultural mentalities and sensibilities influence penal practice. In one sense this is a continuation of the previous sections, because culture in its widest sense covers all aspects of social life. Foucault's political and technological theory of society and punishment and Weber's bureaucratic forms are themselves features of a cultural analysis. Foucault and Weber's theories can be considered as explorations of the characteristics of modern society's culture.

The key question in this section is how new moral and cultural structures, permissions and prohibitions influenced attitudes and emotions to such an extent that the application of corporal punishment in modern societies seems cruel and barbaric. Before addressing this question in more detail, a brief explanation of the relationship between emotions, attitudes and culture is necessary.

Sensibilities, attitudes and mentalities constitute the wider cultural patterns of a society.¹⁷⁶ Mentalities include mental phenomena such as values and beliefs which help human beings to construct their worldview. Religions, moral values, customs, superstitions, and traditions can be studied within the general framework of mentalities.

¹⁷⁶ David Garland, 'intended to use a wide definition (of culture) which will cover those phenomena of cognition known as 'mentalities' and also those of affect or emotion usual termed 'sensibilities'. In its cognitive aspect, culture refers to all those conceptions and values, categories and distinctions, frameworks of ideas and system of belief which human beings use to construe their world it thus covers the whole range of mental phenomena... philosophies, sciences, and theologies are included alongside traditional cosmologies, folk prejudices, and 'plain common sense.' These 'mentalities' or ways of thinking are in turn, closely linked to ways of feeling and sensibilities, so that the cognitive aspects of culture become inseparable from its affective dimension. (Garland 1990a, p. 195)

These mentalities directly influence our sensibilities. As we saw, scientific and rationalistic mentalities can give rise to a dispassionate reaction against crimes, while traditional and religious mentalities may cause an emotional response. It is my contention that that these two conceptions are barely separable. Intellectual content and emotional aspects of culture are closely intertwined. The way we think directly affects our feelings. The "ideas can become beliefs, thus fusing emotions and specific intellectual content."¹⁷⁷

However, it was not only "in the pre-modern era [that] the pattern of punishment in western societies broadly followed the cultural values"¹⁷⁸ - the history of punishment as a whole demonstrate the dynamic impact of thoughts and moral, and emotional forces on the penal form. "The criminal law of England [for example] has always been sensitive to the needs and aspirations of the English people, and it has continuously changed under the impact of the predominant opinion of the day".¹⁷⁹ Penal measures like the flogging of bodies, exposing offenders to the crowd and violent treatment, gradually contradicted contemporary sensibilities and disappeared from modern countries' criminal justice systems.

Penal culture in modern societies deeply affects penal policy. Viewing criminals as mentally ill or irrational individuals brought about diverse penal practices in which evaluation of the criminal's character became a crucial part of sentencing. These practices, have increasingly been influenced by scientific culture from the nineteenth

¹⁷⁷ Mc Gowen 2000, p. 9

¹⁷⁸ Pratt 2002, p. 422

¹⁷⁹ Radzinowicz 1948, p. 1x

century onwards and this variety of knowledge shaped "scientific criminology, penology, psychology, and so on,"¹⁸⁰ which through their discourses and specialized vocabularies, transformed penal culture. As a result, it can be said that changing modes of repression can be an expression of changing mentalities.

This is why Spierenburg, for example, studied the subject matter of changing modes of punishment "from the angle of the history of mentalities."¹⁸¹ For Spierenburg, transformations in penal practices cannot be explained, "without taking changing sensibilities into account."¹⁸² He considers changing modes of repression as a reflection of shifting sensibilities. These sensibilities are important elements of cultural structure. "The human organism is not an empty vessel into which culture simply pours its contents."¹⁸³ Emotions and sensibilities are part of the personality of a human being that developed through processes of socialization and civilization. Thus, emotions are socially constructed, since "the range and refinement of the feelings experienced by the individuals, their sensitivities and insensitivities... show considerable variation across cultures."¹⁸⁴ But in saying this, the following question emerges: what is meant by the term civilization?

¹⁸⁰ Garland 1990a, p. 206

¹⁸¹ Spierenburg 1984, p. vii

¹⁸² Ibid p 1x

¹⁸³ Garland 1990a, p 213

¹⁸⁴ Ibid.

IV-1 Civilizing Punishment

For Norbert Elias "the concept of "civilization" refers to a wide variety of facts, [including] the form of judicial punishment."¹⁸⁵ For him civilization is the "outcome of long-term processes of cultural, psychological change from the middle age onwards,"¹⁸⁶ that leads to two prime consequences. First, the gradual monopolization and centralization of the modern state in using force over citizens and legal sanctions over social disputes.

Second, citizens in modern societies came to internalize restraints, controls and inhibitions on their conduct, as their values and actions came to be framed around increased sensibility to the suffering of the others and the privatization of disturbing events.¹⁸⁷

According to Elias, the advanced state of labour division, a greater level of social interdependency, the centralized state, and innumerable rules and restrictions in long term processes transformed and refined the instinct of aggressiveness, and "all other instincts."¹⁸⁸ Activities like fighting, killing, torture, and burning which were socially permitted, and even celebrated, in the Middle Ages became abnormal and prohibited in the nineteenth and twentieth centuries. For him there was a psychological mechanism through which socio-cultural changes gradually become part of the personality structure of the individual. For him, what is socially undesirable and disapproval by generating anxiety through punishment fight with hidden impulses and refined them. As he

¹⁸⁵ Elias , 2002, p 5

¹⁸⁶ Ibid

¹⁸⁷ Pratt, 1999 p 273

¹⁸⁸ Elias 2002 p 161

explained, the naked and purposeless torture and public execution prevalent in the sixteenth century nowadays arouses revulsion. It is a sign of "advance in the frontiers of shame, in the threshold of repugnance (and) standards of affect"¹⁸⁹ that have taken place in civilized societies.

For Spierenburg, the civilization of punishment and absence of physical punishment occurred in two phases. The "disappearance [of] most forms of mutilation in the early seventeenth century"¹⁹⁰ has been considered by commentators "as a sign of the greater civilization of their own time."¹⁹¹ But it was not until around 1800 that, among certain groups of elites, all forms of public and physical punishment were considered to be uncivilized. Second, it was during the course of the last two hundred years that civilized sensitivity spread to the middle classes and formed public opinion. The pattern of punishment in modern societies broadly "followed the cultural values implicit in the civilizing process. As the thresholds of sensibility and embarrassment were raised, so we find changing attitudes to corporal and capital punishment."¹⁹²

The history of sensibilities and their correlation with the history of punishment documents the relationship between changes of attitudes and shifts in penal practice. Historians have given numerous instances of death penalty and public execution for minor and major crimes during sixteenth and seventeenth centuries: "At some periods in the sixteenth and seventeenth centuries of English history criminal law was administered

¹⁸⁹ Elias 2002, p 172

¹⁹⁰ Spierenburg 1984, p 185

¹⁹¹ Ibid.

¹⁹² Pratt 1999 p.22

with great rigor.”¹⁹³ For a long time public torture and execution were normal punishments, and “different forms of mutilations were considered acceptable.”¹⁹⁴ Not only was there no significant opposition to such spectacles among the public but, they were often happy to take part in such ceremonies.

If the death and suffering of human beings was increasingly regarded as a painful event, it was because individuals were gradually seen as equal in their humanity. If the execution of a nobleman in the fifteenth century was sad and distasteful, this became a general expression of objection against public execution as a whole by the end of the eighteenth century. Terms such as ‘horrible spectacle,’ ‘terrible spectacle,’ and ‘cruelty of justice’, which prevailed in eighteenth and nineteenth century penal culture illustrate the increasing of repugnance of such punishments.

Sympathy “was also called “humanity” and humanitarians often used ‘sympathy’ when characterizing their relation to suffering in explaining their motives for acting.”¹⁹⁵ This sympathy and humanitarianism are remarkable elements of western culture, and have had a determinant role in shaping penal practice. Termination of public executions and the infliction of physical punishment are treated as a “triumph for humanity”¹⁹⁶ because these cruel penal practices are regarded as being against human sentiments. Moderated modern punishment is the outcome of a “victory of human values expressing

¹⁹³ Radzinowicz 1948, p 139

¹⁹⁴ Ibid., p 139-141

¹⁹⁵ McGowen, 1986, pp313-314

¹⁹⁶ McGowen 1994 p 258

the cultural supremacy of the present.”¹⁹⁷ In contrast to defenders of eighteenth-century penal policy who believed “the gallows inspired terror in those whose duty was to obey,”¹⁹⁸ according to new feelings, reliance on capital punishment was a mistaken policy.

The reformers introduced a different analysis of sympathy. For them, this compassion was considered to be a new basis for social solidarity. Sympathy for all humans including the poor and criminals implied that punishment should “be constant to the feelings and sympathy of mankind.”¹⁹⁹ In this way of thinking punishment, in particular severe punishment was considered destructive. It was argued that punishment should rely upon those elements grounded in human psychology to promote an ever greater social solidarity.

Durkheim had also noted this understanding of punishment. For him, severe punishment could create and protect social union. As was explained in the second chapter, for him, severity of punishment depended upon the strength of sentiments that were offended against and the gravity of the crime. For him, collective sentiments in primitive societies were religious in character and have a collective identity. Even strong feelings of sympathy for an offender cannot modify the anger that is aroused by sacrilege. But the content of collective consciousness in modern society has changed. Traditional religious sentiments were replaced by the ‘cult of the individual’ and now an act is

¹⁹⁷ Garland 1990a, p 196

¹⁹⁸ McGowen 1986 p 313

¹⁹⁹ *Ibid.*, p 312

criminal because it offends humanity in general and not transcendent issues and divine rules. Thus, strong feelings of pity for the offender in modern societies can not only counterbalance the sentiments he has offended and that react against him, but also dictate that cruel punishment is an immoral act of sacrilege.

IV-2 Culture and the Public opinion

Public opinion is a new phenomenon, which appeared in democratic countries from the early eighteenth century onwards, "when popular images of the king changed from a legendary figure to the individual leader who might be held responsible"²⁰⁰ for social problems. Then, in democratic countries where the new form of sovereignty, the public, replaced the traditional form of the ruler, the relationship between public opinion and government policy became closer. For example, as will be argued in the next chapter, in the USA investigations show that "current public opinion does influence death penalty sentencing rates."²⁰¹ Nowadays, in a number of western countries, campaigns for or against certain punishments are known. These political and popular pressures sometimes change the nature of penal policy. This is why some penal policies have been labelled as "populist punitivism."²⁰²

In countries where there is a correlation between elections and the institution of the judiciary, (for example, where the head of the judiciary is a member of cabinet), the

²⁰⁰ Beniger 1996, p 660

²⁰¹ Norrander, 2000, p 771

²⁰² Tonry 2001, p 517

effects of public opinion are more visible. In democratic countries, crime, punishment, law and order are often campaign issues in elections. This process creates "an atmosphere which sensitized the public to crime problem. Concern about (rising) crime intensified, resulting in a hardening of attitudes towards criminals and a greater demand for hard penalties."²⁰³

Public opinion is a complex process and "pollsters adopt different definitions"²⁰⁴, yet "the problem of definition is foremost."²⁰⁵ Public opinion can be described "as the opinions of all members of a defined universe."²⁰⁶ It can be understood as a communication between citizens and their government. Since in democratic countries in which this communication exists there is "access to information on the issues with which public opinion is concerned,"²⁰⁷ public opinion can be actively present and can fulfil certain functions.

Public opinion regarding crime and punishment is a key ingredient of penal culture. Therefore it needs to be taken into account in every social and cultural investigation of punishment. Current public opinion is a reflection of the ideas, mentalities and sensibilities established in any given society. Although mass media and political campaigns can effectively alter current public opinion

²⁰³ Ranking, 1979 p 207

²⁰⁴ Plowman 1962, p 331

²⁰⁵ Ibid

²⁰⁶ Sedman 1932, p 339

²⁰⁷ Speier 1950, p. 377

Ultimately, public opinion on crime and punishment is a complex mix of perception, reason, emotion and social ideals of justice, one that cannot be readily reduced to political slogans and newspaper headlines.²⁰⁸

In civilized countries few can deny the energetic and governing force that public opinion exerts, and the fact that governments must take notice of public opinion. Public opinion is extracted through various methods: polling (means of standard questions presented to an appropriate sample,) platform meetings, general strikes, press reports and elections. Among other indicators, electorates have now become synonymous with public opinion. There is a direct link between voting and government action. Nowadays "voting for public office directly indicates the opinions of the masses."²⁰⁹

Public opinion in modern societies influences penal policy in various ways. Even in countries like America the supreme courts - considered as unelected and democratically unresponsive institutions - are affected by public opinion. Their "decisions not only correlate with public opinion but are directly influenced by public opinion."²¹⁰ Judges are members of society and, more than lay people, are aware of trends and attitudes that prevail throughout the community. They are "broadly aware of fundamental trends in ideological tenor of public opinion, and ... some justices, consciously or not, may adjust their decisions at margins to accommodate such

²⁰⁸ Warr Mark 1995, p 302

²⁰⁹ Benson 1967, p 566

²¹⁰ Mishler and Sheehan 1996, p 711

fundamental trends.”²¹¹ These judges are indirectly influenced by public opinion. As mentioned above, even in countries like America where superior judges are unelected (which gives rise to greater independence) they are not fully free from public opinion because “the people elect the president and the president selects the justices with advice and consent of the senate.”²¹² As a result of these direct and indirect influences of public opinion on sentencing, recent research shows that “shifting tides of public opinion can have important effects on supreme court decisions.”²¹³

But how does public opinion participate in sentencing and the performance of penal practice in contemporary societies? Where is the spectacle? And in what way is public opinion involved in penal practice’s ceremonies, where privatization, bureaucratisation, and disciplinary measures in modern forms of punishment have replaced spectacles of punishment? Nowadays, in particular, there is no place for rituals like public execution and public torture. There is no direct access for the public into the sphere of penal practice. However, as was discussed in previous section, public opinion has different functions in different processes of criminal justices such as courtrooms, the process of sentencing and the declaration of punishment.

The processes of legislation and declarations of law are more than ever, accessible to the public. The “principle of publicity, in which the public text of the law (The Penal

²¹¹ Ibid

²¹² Ibid

²¹³ Mishler 1996, p 169

Code) was supplemented by the procedural publicity of trial,”²¹⁴ can be seen as a sign of public involvement in the system of criminal justice. Criminal procedure and the process of sentencing in countries like the United Kingdom is “organized so as to minimise[the] dramatic potential”²¹⁵ of public opinion on the legislative process, and English lawyers and judges “resisted several efforts to render the law in the modern public form of a code.”²¹⁶ However, this should be regarded as exceptional case among continental countries.

Moreover, “the courts have tended to become the forum where ‘justice is done’ to which public attention is directed,”²¹⁷ although one should be aware that, this is not the general rule and every court and process of sentencing does not have the capacity to attract public attention. Remarkable cases, like murder trials which are “notable for the peculiarity of their facts, the character of the criminal, or the notoriety of the trial at the time it took place,”²¹⁸ have the capacity to generate public attention. But, public attention to “remarkable trials” can be considered as a symbol of public sensitivity. It seems that social issues, like crime and punishment, are capable of “generating levels of public passion and social consensus”²¹⁹ in all societies.

Consequently, current public opinion nowadays should be considered as a crucial factor in the determination of punishment. As Radzinowicz argues, once public

²¹⁴ Farmer 2003 p. 150

²¹⁵ Ibid., p. 150

²¹⁶ Ibid., p. 151

²¹⁷ Garland 1990a, p. 71

²¹⁸ Farmer 2003 p. 164

²¹⁹ Warr 1995, p. 296

consciousness was "aroused it did not allow itself to be stifled."²²⁰ Elsewhere he cites from Buckle that in England "as soon as public opinion is formed, it can no longer be withstood."²²¹

²²⁰ Radzinowicz 1948 p. 39

²²¹ Ibid p.39 cited from Buckle 1908,p.503

V Conclusion

My study in this chapter was an effort to fill the gaps in Durkheim's theory of punishment. As mentioned above, Durkheim ignored significant aspects of modern penal culture. These are major trends, which have had a substantial influence on the institution of punishment in modern criminal justice. Punishment in modern societies is affected by a collection of political, technical and organizational factors. As we have seen in Weberian theory, principles of bureaucracy, scientific attitudes, professional groups, processes of rationality and calculable forms of social practices are essential components of western culture and have had a great impact on punishment in developed countries.

Modern forms of social control, considerations of political expediency and disciplinary mechanisms of repression provided us with a new framework of analysing penalty. Foucault replaced social sentiments in Durkheim's theory with the will to power. Punishment is explored by Foucault as a technology of docility and administration of life. Normalization, standardization and economy of subjection, which are analysed by Foucault, are also highly significant to understanding the nature of modern punishment. These technical, professional and managerial dimensions of modern penal culture are not examined by the Durkheimian structural and expressive account of society and punishment.

Moreover, Durkheim studied collective sentiments as the origin of punishment and saw correlation between the changing of these sentiments and the severity of punishment; but he viewed this phenomenon only at the macro level of society, ignoring

the dynamism of individual sensibilities and emotions at the micro level, and the relationship of this phenomenon with alterations in punishment. However, Elias and Spierenburg have shown, new feelings of civilized individuals have led to major shifts in penal practice in modern societies, such that barbaric traditional forms of penalty have become totally impossible in these countries.

However, Foucault and Weber's political and technical theories of society and penal practice can be seen as a new version of culture and religion in modern society. Combinations of sacred modern notions such as nationhood, human rights, human dignity, freedom, civilization, discipline, and order give rise to the construction of a civil and communal religion. These holy conceptions are deeply held and play a considerable role in criminalization and penal practice. Although Foucault and Weber have not developed their ideas on religion and society, they both acknowledged the significant role of traditional religion.

Despite the above arguments, Durkheim's theory still has significant insights to offer. Cultural resonance coupled with psychic and emotional aspects of punishment - especially the role of sacred notions in general and religion in particular - in Durkheim's theory of penal practice- are significant dimensions of punishment in modern society. His theory expresses crucial dimensions of punishment in both traditional and modern societies. The essence of punishment for him has remained an automatic and emotional reaction against violation of common and sacred social sentiments. The modern analysts of penal practice have ignored these crucial religious and moral aspects of Durkheim's

theory of punishment in the modern world. The passionate reaction against violations of sacred social values are productively routinized and modified by professional institutions, but they have not changed the permanent essence of punishment. In the following two chapters I will examine two different case studies to test Durkheim's cultural, expressive and religious theory of punishment. The alterations of punishment in America from 1970 onwards and in Iran following the Islamic revolution in 1979 constitute the main themes of these chapters.

Chapter IV: Harsh Punishment in America

Introduction:

Severity of Punishment in USA

Criminal punishment in the U.S.A. has undergone profound changes over the last 30 years. American penal policy is now in the midst of a national movement toward a uniformly severe approach to crime. Nowadays punishment in the United States is not comparable with its Western counterparts, instead is compared by critics like Whitman with Taliban Afghanistan or Nazi Germany¹. The USA turned “sharply toward retributivism and permanent incapacitation of habitual offenders.”² The USA now has the highest rate of incarceration in the world, more than ten times that in Western Europe. Further, they have revived “old sorts of punishments, from chain gangs to public shaming,”³ accompanied by new sorts of punishment, from boot camps to electronic monitoring. The American system of criminal justice, therefore, has shown a systematic and fundamental movement toward increased harshness.

The last third of the twentieth century was “the age of the war on crime.”⁴ This war occurred on various fronts and used many weapons. When the crime rate increased dramatically during last thirty years, the public put enormous pressure on politicians to do

¹ Whitman 2003, p.4

² Ibid

³ Ibid., p. 3

⁴ Dubber 2004, p. 50

something. "A reaction set in (and) a wave of conservatism swept the country."⁵ As a result of this pressure, the penal system underwent a backlash against a system perceived as what too lenient. Both parole and indeterminate sentences were abandoned in some states in 1977. The American system denied measures of individualization and thus shifted "its emphasis from *offender* to the *offence*."⁶ Criminal justice institutions like police and prison lost their discretionary, professional autonomy and were forced to follow state-imposed standards. Faith in rehabilitation collapsed and "during the 1960s through the mid - 1980s, legislatures, judges and commentators abandoned the rehabilitative ideal of the criminal justice system."⁷ Today, correctionalist programs "no longer claim to express the overarching ideology of the system, nor even to be the leading purpose of any penal measure."⁸ The rehabilitative rationale was not only assumed to be non-efficient idea but also counter-productive.

In contrast to most of the twentieth century, in which policy makers mostly tried to create alternatives to prison -through probation, fines and various kinds of community penalties - in the last thirty years this tendency has been reversed. Incarceration is no longer for the correction of criminals, but instead, a way of maintaining the separation of offenders from society and for the suffering of criminals. The incapacitation of dangerous groups is now the main goal of incarceration. Following these new trends rates of imprisonment rose sharply and increased rapidly : "In the period from 1973 to

⁵ Friedman 1993, p. 305

⁶ Ibid., p.305,306

⁷ Vitiello 1997, p. 397

⁸ Ibid., p.8

1997, the number of inmates incarcerated in the US rose by more than 500 percent.”⁹ The USA prison population now stands at two million¹⁰ - the largest prison population in the world - in addition to “four million or so under various forms of non-carceral control, including parole and probation.”¹¹ This equates to more than six million, or three percent of the population under direct state control. These staggering figures are the outcome of various approaches to crime that became to penal policy. Commonly used terms such as, “three strikes and you’re out,” “truth in sentencing”, “zero tolerance policy,” “law and order model”, “war on drugs”, and “get tough approach” partly show the features of the new American appetite to punish.

American penal literature from around 1970 onwards can illustrate this approach. The general preventive effects of punishment came to occupy a central position in penal legislation, sentencing policy and in the field of criminology. It was believed that the idea of the ineffectiveness of punishment “in eliminating proscribed behaviour ... was wrong.”¹² Deterrence was considered as the fundamental rule of human behaviour in society. Research demonstrated that severity of punishment associated with certainty of punishment had a deterrent effect upon rates of crime: “certainty and severity combine to jointly influence crime rates.”¹³

⁹ Garland 2001, p. 17

¹⁰ Beck and Kardery, March 2001 Bureau of Justice Statistic Bulletin,

¹¹ Dubber 2001 p.832

¹² Andersons 1975, p.338

¹³ Antunes George and A. Lee Hunt 1973, p. 486

The new use of relatively fixed and firm punishment in American penal policy can also be attributed, in part, to the retributive (just desert) approach. According to this idea punishment should be unpleasant and criminals should serve their prison time as atonement for their crimes. In line with this belief, recent trends in American criminal justice have stressed the importance of longer sentences and obligatory sentencing. One of the primary changes in this area "has been the enactment of truth -- in sentencing; legislation."¹⁴ This term implies a kind of stability, and predictability in penal process. This policy "requires offenders to serve a substantial portion of their sentence in prison, and which reduces the discrepancy between the sentence imposed and actual time served in prison."¹⁵ Since the enactment of truth-in-sentencing laws in early 1995, offenders have had to serve at least 85 percent of their prison sentence. This retributive approach was a movement against parole as a system that reduced the severity of punishment.

These examples are not disparate events in the American penal system; rather they are signs of new general and systematic trends that have overwhelmingly transformed the nature of American criminal law. Following the transformations in policies noted above, substantive and procedural criminal law has been made to be more compatible with new the circumstances. Once the state decided to defend communal interests, it tried to achieve this efficiently. "Crimes must be easily detected and easily proved, with minimal constraints."¹⁶ This policy required, on the one hand, abandoning or reducing constraining laws against searches and seizures, and on the other that

¹⁴ B. Wood Peter and Dunaway R. 2003, p. 139

¹⁵ Ibid., p.140

¹⁶ Drik Dubber Markus 2003, p. 54

substantive criminal law define crimes widely, and reduce the constituent elements of a crime. "The fewer elements there are, the fewer elements the prosecutor has to prove."¹⁷

The American Law institute's Model Penal Code (MPC), completed in 1962,¹⁸ abandoned the traditional distinction between attempted and consummated crimes.¹⁹ It was this policy that "softened up these iron-clad principles (*mens rea* and *actus reus*) of criminal-law"²⁰ and paved the way for a tougher approach to crime. It gave the system a kind of flexibility with which to terminate the evil of crime. As a result the form and content of punishment broadly changed – including more "moral offences,"²¹ minors prosecuted as adults,²² disorderly conduct considered as a felony, the defence of insanity was abolished in some states,, mercy and parole reduced or abolished, and mitigating factors like ignorance eliminated. As a result of this deep transformation in law enforcement, crime should be controlled through wider control: not only "every defendant is guilty but [...] every one is guilty."²³ Indeed there is no place for the presumption of innocence. Everybody should be searched and then released. It is a fight

¹⁷ Ibid. Ingredients of this reversal movement can be seen as early as 1933, in the writings of Francis Sayer. As he states, "what is badly needed is some form of administrative control which will prove quick, objective and comprehensive.... The line distinguishing offences which so and those which do not require *mens rea* in the absence of statutory direction depends upon (a) the character of the offence, and (b) the nature of the penalty involved in its violation. In general, offences not requiring *mens rea* are the minor violations of laws regulating the sale of intoxicating liquor, impure or adulterated food, milk, drugs or narcotics, criminal nuisances, violations of traffic or motor-vehicle regulations, or of general police regulations passed for the safety, health, or well-being of the community and not in general involving moral delinquency. See: Francis Bows Sayre 1933, p.69

¹⁸ Dubber 2003, p. 59

¹⁹ It is a conventional distinction in which 'attempts had been punished considerably less severely than consummated crimes. Ibid, p.19

²⁰ Dubber 2001, p.995

²¹ Whitman 2003, p.3

²² Ibid., p. 34

²³ Dubber 2001, p. 50

“on behalf of the community of actual and potential victims against a community of actual and potential offenders.”²⁴

Up until now, I have tried to show how the form and content of criminal justice system in the United States has changed through the use of “get tough” measures. There are, of course, still many supporters of a more humane system, who believe that criminals can be rehabilitated. However,

the predominant call (in American society) is for tougher laws, more and longer sentences, more and bigger prisons... Whenever voters got a chance to express themselves, they almost invariably cast ballots for law and order, toughness, stringency not for due process or reform.²⁵

The major question, however, is why the American penal system has undergone such deep transformations towards a populist and punitive approach. Are these the effects of a failed rehabilitation system? Are they the result of sharply increasing crime rates particularly in the 1970s and 1980s, which led to public questioning of the state's ability to control crime? Which theory can best explain these new trends in the criminal justice system? Could they be analyzed in the light of a Foucauldian technical and strategic approach to penal practice? What is the relationship between a Weberian bureaucratic, scientific and institutionalized framework and current penal policy in the USA? Are these the only possible analyses of modern trends of current penal practice in

²⁴ Ibid

²⁵ Friedman 1993, p. 452

America? How these transformations can be explained in the light of Garland's theory of *The Culture of Control*? Can one resort to a Durkheimian structuralist view, looking at penal practice as an index of social values?

As we will see, there has been a growing movement in the USA toward religion and other traditional values during the last thirty years. There is a correlation between this transformation in social values in American society and the return of old forms of punishment, as well as the development of new forms of harsh and strict penal practice. Notwithstanding conventional analyses of penal practice, it seems that the role of powerful cultural forces like religion has been overlooked in sociological understandings of punishment in modern America. I attempt to address this gap through considering other possible explanations of this systematic and fundamental movement towards harsh punishment.

I High crime rate and harsh punishment

Increasing crime rates during the past fifty years have been a very visible social fact in American society. Over this period, violent crime, street crime and drug abuse became commonplace features of social experience. In New York City, for example, "in 1974, there were 519,825 complaints of serious crime, or about one complaint for every sixteen persons in the city."²⁶ At the same time, robberies, aggravated assaults, rapes and non-negligent homicides significantly increased. "From 1968 to 1974, the rate of non-negligent homicide increased 67%, forcible rape 122%, robbery 43% and aggravated assault 44%."²⁷ The recorded crime rates "by the early 1990s, despite some levelling off, were as much as ten times those of forty years before."²⁸ Therefore, crime and threats of crime became a prominent fact of everyday life, and the management of crime became a key concern of society.

The fact that high rates of crime became part of everyday life in post war USA may seem to explain harsh justice in America. "The ups and downs of punishment rates are seen as the result of varying rates of crime in different places and different times."²⁹ It is argued that penal policy simply reflects the quality and quantity of crime, and that there is a correlation between high crime rates and severe penal policy. Conversely, it is claimed that harsh punishment has an impact on crime rates, or is assumed that high rates of crime increase fear of crime in society, and this give rise to harsh justice. Increased

²⁶ Fishman 1977, p. 283

²⁷ Ibid

²⁸ Garland 2001, p. 106

²⁹ Savelsberg 1994, p. 915

imprisonment is considered as "an almost mechanistic consequence"³⁰ of high rates of crime. There is no doubt that high crime rates directly or indirectly influence penal policy and can make it more severe. For instance, some investigations and data on official rates of violent crime showed "a strong, positive, non-linear relation between public support for capital punishment and crime rates across regions of the U.S."³¹

It is not implausible to hypothesize that increased victimization would anger frightened citizens and amplify demands for harsher policies. The empirical evidence, however, does not lend weight to this hypothesis. Social facts do not support a positive correlation between crime rates and the quantity and severity of punishment.

Decline in punishment while crime rises during the 1960s (in USA) and a rapid increase in punishment beginning in the 1970s when crime rates had just begun to stabilize can hardly be interpreted as direct causal relation.³²

Equally, crime rates and fear of crime are distinctive phenomena that, notwithstanding their relation, can be studied independently - which incidentally would reinforce a Durkheimian analysis of simultaneously increasing social anxiety and harshness of punishment. This means that fear of crime as an independent social factor could bring about a harsh punishment regardless of crime rate. In the late 1970s and early 1980s in the United States police research studies showed that "some measures

³⁰ Tonry 1995, p. 168

³¹ Ranking 1979, p. 194

³² Savelsberg 1994, p. 926

might fail to reduce actual crime rates but nevertheless succeed in reducing the reported levels of fear and insecurity.”³³ Such fear may be brought about by false information that can be removed by virtue of true information. In the 1970s people were seriously worried about rising crime and believed the problem to be getting worse – despite the fact that “recorded and actual rates (were) stable or declining.”³⁴

Sometimes it has been tried to show a positive relation between harsh punishment and rates of violent crime. This claim is supported by FBI data on violent crime rates, which found that, “a rather strong, positive, nonlinear relation between support for capital punishment and violent crime rate was revealed.”³⁵ There are, however, a number of arguments which may discredit this conclusion. Firstly, this investigation only showed the relation of violent crime rate to public attitudes toward punishment, rather than the relationship between high crime rates and the harshness of punishment in general. Secondly, increasing public support for the death penalty did not begin for three years after the “relatively large increase in the official violent crime rate (FBI).”³⁶ Thirdly, as this inquiry showed, changing attitudes toward punishment are often a reflection of media’s coverage of violent crimes, and violent crime itself.

As will be discussed below, fear of crime is considered to be a crucial factor in the relationship between crime rates and harsh penal practice, but there is not necessarily a direct relationship between violent crime, fear of crime and the punitive approach in

³³ Garland 2001, p. 122

³⁴ Ibid., p. 107

³⁵ Ranking 1979, p. 207

³⁶ Ibid

American criminal justice. For example, although the violent crime rate and Americans' fear of crime have remained essentially stable since the early 1970s, "recent years have seen rising public support for punishment of criminals."³⁷ Moreover, rising crime rates were also experienced in continental countries yet this did not produced the same effects. The rising crime rate can logically support the punitive approach in the United States, "but cannot by itself explain it."³⁸ Thus, high crime rates can support the hardening of penal policy, but a positive causal relation between high crime rates and hard penal policy cannot be demonstrated.

Therefore, there may be other forces at work that brought about these changes. Even if one considers a high crime rate as an important factor in the shift in the American justice system, we must still trace other technical, organizational, social, political and cultural factors that may have shaped how penal policy should respond to the new conditions.

³⁷ Shaw, Shapiro, Lock and Jacobs.1998, p. 405

³⁸ Savelsberg 1994, p. 539

II Foucauldian technical approach and American penal policy

As we saw in the previous chapter, Foucault saw penal policy as a strategy of social control. He considered power as something autonomous and beyond social values, that predicts, calculates, and purposively determines all techniques of social control. He analyzed punishment in light of the sociology of dominance and control. He investigates a power strategy, its programs, and combination of material practices that serve those predetermined strategies. These strategies are applied to a passive society to make it disciplined and productive. Manifestations of punishment as an instrument of power are visible in the United States penal policies.

The administration of the American prison system had great effect on his theory of the prison, because "American prison is the only prison that Foucault ever visited."³⁹ As he observed, the great carceral system is well developed throughout the American criminal justice system. Rehabilitative treatments, disciplinary programs, sophisticated devices of surveillance in prisons, a developed probation system, electronic monitoring and so on are representations of a Foucauldian view of penal practice. These are the disciplinary techniques of comprehensive strategies of power.

A quasi- Foucauldian and Weberian explanation for new penal policy called '*actuarial justice*,' captured some aspects of the changes in law enforcement in the United States. Actuarial justice is a set of specific technologies that target dangerous groups to manage their likely risks. Incapacitation, preventive detention, and profiling

³⁹ Ibid., p.126. French prisons do not (or at least did not) accept visitors

are considered by Malcolm Feeley and Jonathan Simon as key elements of this new policy.⁴⁰

The target of this strategy is population and the prevention or minimisation of risk. Crime is considered as a normal fact of modern life. It is seen as a typical risk to be calculated, predicted and avoided. From this point of view, penal policy pushed away from rehabilitation, retribution and even deterrence to a concern "with prevention, harm-reduction and risk management."⁴¹ Data of risk assessment, indicators "such as residency, marital status, employment status, criminal record, education and the like can also be systematically included in developing profiles of dangerousness."⁴² Prison, probation and parole, in the actuarial justice thesis, are justified in light of their respective degree of reduction of dangerousness. From this perspective, dealing with the 'underclass' through violating traditional principles of equality can be justified "by a powerful new social logic, risk management."⁴³ The study of actuarial justice can be considered as a new dimension of crime control in modern society. This new pattern of dealing with crime, and criminals, potential and actual, has its own logic, language and technology, and brought about a new style of crime control in modern penal culture.

However, the rejection of individualization and rehabilitative programs, and the continuation of traditional, populist penal policies, the performance of capital punishment, and the expiatory character of prison can hardly be justified according to a

⁴⁰ Feeley and Simon 1994, pp. 174-177

⁴¹ Garland 2001, P. 171

⁴² Feeley and Simon 1994, p. 179

⁴³ Ibid., p. 193

Foucauldian framework. As Simon and Feeley argue, "This reform movement responded to precisely the features of disciplinary punishment that *Discipline and Punish* identified: the intrusive demands to penetrate in to the subjectivity of the offender; the legal power given to experts to individualize sentences; deceptive denial of the punitive elements remaining in penal practice."⁴⁴ The unprecedented expansion of prisons replaced the idea of prison as correctional project. The disciplinary policy of standardization and normalization of criminals "has been replaced by a mission of providing long-term warehousing of population with little place in the economy."⁴⁵

Foucault argued that the birth of the prison and new ways of punishment were reflected of a new conception of man and social discipline. For him, in the prison as in hospitals, schools and military organizations, "discipline" was established to produce a citizen that was docile, "hardworking, regular in his habits, productive, pious, and above all self-regulating."⁴⁶ This analysis is not fully in harmony with America's policy of mass imprisonment, which aims at incapacitation, deterrence, and the separation of criminals from society. The strict regime of prison in the USA, denying prisoners' access to higher education in some states,⁴⁷ the shame and stigma attached to the prisoner show that prison is more a socially punitive reaction than an institution of disciplinary docility. Rebellion and disorder in prisons, and the presence of recidivists who have previously served their punishment in prison further contradict Foucault's theory of prison as a disciplinary and productive institution.

⁴⁴ Simon 1996, P. 318

⁴⁵ Ibid

⁴⁶ White Hayden 1976 p. 318

⁴⁷ Page Joshua 2004, p. 373

III Garland's 'Culture of Control'

One of the most influential explanation of these dramatic developments in US criminal justice over the last thirty years is David Garland's *The Culture of Control*. It is important to consider this not only for the arguments about the US, but because he locates his theoretical explanation of the change in an account of a changing penal culture. Like *Punishment and Modern Society* this work is a theory of social and penal changes, of how cultural, social and economic forces "have reshaped criminological thought, government crime policy, and the attitudes of penal culture."⁴⁸ As he has said, this book builds upon his earlier work in *Punishment and Welfare*, which describes the rise of a welfarist form of criminal justice at the start of twentieth century, and *Punishment and Modern Society*, which developed a social theory of punishment that stressed the cultural as well as the political element of penal institutions.⁴⁹ It is also important to consider the weight that he accords to religious beliefs and institutions-the main theme of my argument- in his examination of changing penal practices in the US.

There is no doubt that *The Culture of Control* "is to date the best and boldest analysis of the dramatic developments in the criminal process in the United States during past quarter century."⁵⁰ The aim of Garland's book is to analyse the "movement from the penal welfarism which characterised most of the twentieth century with its emphasis on rehabilitation, correctionalism and reform, to what he terms the 'crime control complex',

⁴⁸ Garland David 2001,p.x

⁴⁹ Ibid

⁵⁰ M. Feely Malcolm 2003,p. 126

the culture of control which has emerged in the last 30 years.”⁵¹ As he states, it is about the spectacular developments that have taken place in our social “response to crime during the last thirty years and about the social, cultural and political forces that gave rise to them.”⁵² His starting point is that a new form of dealing with criminal activities has emerged which involves a set of strategies and practices which are characteristically “different from the penal welfare and correctionalist crime control policies which were associated with modernity.”⁵³ The practices that were centred around the reform of individuals through treatment programmes and the reformation of offenders through application of various scientific techniques, came under increasing critical scrutiny and lost their cultural and political support. He suggests that over the past thirty years in the USA, there has been a revolution in the values that have motivated private and public actors in the area of criminal justice. The growth of crime and the increase in public concern and fear of crime, accompanied with economic, social, political and cultural changes, brought about a new and complex system of crime control in the United States.

The important question for him, however, is how one can explain these changes and the forms that they have taken. His argument is that current crime control policies in the U.S are formed by two fundamental social forces: “the distinctive social organisation of the late modernity, and the free market, socially conservative politics that came to dominate the USA in the 1980s.”⁵⁴ The focus of the book is on these social forces, and the author presents an account of how these cultural forms provoked and informed

⁵¹ Young Jock, 2002 p. 228

⁵² Garland David 2001,p.vii

⁵³ Matthews Roger 2001,p.217

⁵⁴ Garland David, 2001,p.x

the development of crime control and criminal justice policy. He attempts to demonstrate "how the experience of crime is densely woven into the fabric of collective mentalities and sensibilities, reaching far beyond the issue of crime itself."⁵⁵ 'Fear of crime' is a major public issue,⁵⁶ and social institutions, public and private, have purposively planned to deal with this new collective experience of crime. For Garland, fear of crime has become of new salience since the 1970s. It has come to be regarded as "a problem in and of itself, quite distinct from actual crime and victimization."⁵⁷ According to Garland, public opinion research has confirmed the emergence of fear of crime- a generalized sense of insecurity, anger, resentment correlating with patterns of risk and victimization. There is a general sense on the part of a large majority of the public in the United States that crime has increasingly become worse and "there is little public confidence in the ability of the criminal justice system to do something about this."⁵⁸

Along with this argument he discusses the relationships between fear of crime, mass media and politics. As a result of mass circulation newspapers as a central institution of modern life and in particular the television revolution, local or limited significant problems such as racism, sexism, child abuse come to be perceived as everyone's problem. "Fears and resentments that are such a feature of life in high crime societies find a cultural outlet and expression on the TV screen."⁵⁹ Over the last quarter of the twentieth century high crime rates, movements for victims support, public fear of crime, lack of confidence in the criminal justice system and in the state's capacity of

⁵⁵ Ibid. 686

⁵⁶ O'Malley Pat 2002, p.260

⁵⁷ Garland David 2001 p.10

⁵⁸ Ibid

⁵⁹ Garland David 2001 Ibid p.157

control crime, a perceived lack of security and the role that media played in intensification of these conditions, all had significant implications for state authorities and penal policy. The transformations in media “have helped create a greater level of transparency and accountability in our social and governmental institutions.”⁶⁰ The rise of mass media, “the universalizing of democratic claims, and what Edward Shils called the politics of ‘mass society’ put in place new laws and forms of accountability with regard to criminal justice authorities.”⁶¹ In the 1990s “the pattern was for high visibility crime cases to become the focus of a great deal of media attention and public outrage, issuing in urgent demands the something be done.”⁶² He is not saying that the media has created fear of crime or popular punitiveness as a strong political current, but his point is rather “that the mass media has tapped into, then dramatized, and reinforced, a new public experience... and in doing so it has institutionalized that experience.”⁶³ Public opinion about criminal justice is founded on these collective representations rather than correct information.

Politicians had their own concerns and this social context was considered as a golden opportunity for America’s political actors, because politicians need issues that have a relatively broad appeal. The aggravation of critical sentiments through the mass media and electoral competition urged them to react. For politicians in democratic countries like America acting in the context of electoral competition, “policy choices are heavily determined by the need to find popular and effective measures that will not be

⁶⁰ Ibid. p.86

⁶¹ Ibid p.146

Ibid p.92

⁶² Ibid, p.173

⁶³ Ibid

viewed as signs of weakness or abandonment of the state's responsibility to the public."⁶⁴ In such conditions political actors are concerned more with the anxiety and outrage provoked by crime and intensified by mass media. Television's coverage of factual or unrealistic crime dramas pushes politicians "to respond to crime as and emotional, human drama and prompt [them] to think of criminals as more numerous, more threatening, and more dangerous than they typically are."⁶⁵

As a result of this new situation, the relationship between politicians, the public and penal experts has clearly been transformed into one "in which politicians are more directive, penal experts are less influential, and public opinion becomes a key reference point for evaluating options. Criminal justice is now more vulnerable to shifts of public mood and political reaction."⁶⁶ Nowadays current legislators are highly concerned with public attitudes and sentiments about punishment and control. In the process of penal policy making there are fewer intervening obstacles between the political process of legislation and allocation of punishment and "public demands for greater punishments are now more easily and instantly translated into increased sentences and longer jails."⁶⁷ Similar conditions can also be identified in the process of sentencing.

For Garland, however, these transformations are best explained in Foucauldian terms.⁶⁸ His theory in *The Culture of Control* "is a genealogical account that aims to

⁶⁴ Garland 2001, p. 111

⁶⁵ Ibid. p.158

⁶⁶ Ibid, p.172

⁶⁷ Ibid

⁶⁸ Garland David 2001 p.161

trace the forces that gave birth to our present-day practices and to identify the historical and social conditions upon which they still depend.”⁶⁹ He develops, “a social and historical narrative designed to map the social conditions of existence which underlie contemporary crime control.”⁷⁰ The book thus introduces a complex and theoretically informed account of how particular social policies came into being.

Garland analyses these changes in criminal justice policy according to a Foucauldian framework of social control. He contends that it is accurate to attribute “authorship of these ways of thinking and acting to the countless unnamed managers and staff, whose job it has been to come up with practical solutions to counter the problem of crime as it affects their particular enterprise.”⁷¹ For him private and governmental approaches have to be seen as a disorganized, diffuse field of methods and crime control techniques “composed of a multitude of small –scale inventions,”⁷² as recipes and problem-solving activities which have “come to be taken up and developed by criminological experts.”⁷³

Given the perception of high crime rate as a normal fact of life, accompanied by the institutionalized fear mentioned above, the new limits of the criminal justice are set by public mistrust, the belief that “nothing works” The limitations of the criminal justice system suggest, in Garland’s view, the erosion of the “myth” of sovereign state and its ability to deliver law and order and control crime within its territory: “The political

⁶⁹ Garland David 2001. p.2

⁷⁰ Matthews Roger 2002, p. 218

⁷¹ Garland David 2001 p.161

⁷² Ibid

⁷³ Ibid

sector and policy world face a predicament to which its agents feel compelled to respond.”⁷⁴ Garland recognizes two contradictory and co-existent⁷⁵ reactions to this social crisis, which he terms adaptive and non-adaptive responses. The adaptive responses include series of strategies that are characterized by a sophisticated level of administrative rationality and creativity. He describes six main sorts of adaptation, including “the rationalization of justice; the commercialization of justice; defining deviance down; redefining success; concentrating on consequences; and redistributing the responsibility.”⁷⁶ Then, as will be discussed below, he sketches out the new ways of criminological thinking that associated and facilitated them. “The agencies involved have, over time, recognized the predicament they face, and respond to its challenges by revising their practices, renegotiating their external relationships, and building new institutions.”⁷⁷

In the second form of (non-adaptive) response, the political machine has repeatedly engaged in a form of denial and avoidance. From the 1980s to the 1990s, policy making in the area of criminal justice become more politicised and subject to greater public, press and electoral procedures. This new form of reaction is described by Garland as impulsive, unreflective action which avoids realistic recognition of foundational problems. “Policymaking becomes a form of acting out that downplays the complexities and long-term character of effective crime

⁷⁴ Ibid

⁷⁵ Garland 2001,p, 113

⁷⁶ ibid

⁷⁷ Ibid, p. 131

control in favour of the immediate gratification of more expressive alternatives.”⁷⁸

Non- adaptive or denial responses preferred by politicians are embodied in ideas like “prison works”, and strategies such as three strikes, chain gangs, Megan’s law and other similar punitive reactions. These are described by Garland as emotional and irrational aspects of penal practice in modern American society, because they are more political and emotionally determined patterns of penal policy than those managed by professional considerations. Governmental research regularly investigates the character and level of social anxieties, “categorising and measuring the emotional reactions prompted by crime,”⁷⁹ in order to determine patterns of penal policies.

Garland goes on to describe two contradictory criminologies – as more theoretical responses to the perceived situation –both considered as reactions to the failures of penal modernism. These are the ‘criminology of everyday life’ and the criminology of the ‘other’. The correctional criminologies associated with penal modernism aimed to change the values and attitudes of criminals and bring deviants back into the social order through moral education and correctional practices that transformed their values and behaviour. Criminologies of everyday life, however, approach social order as a problem of system integration. Instead of the moral integration of human beings into society, the new approach aims to redesign social systems and institutions in such way as to give rise to fewer opportunities for offenders. This new criminology considers how social systems such as the transport system, shops, schools, housing and so on should operate so as to

⁷⁸ Ibid, p.134

⁷⁹ ibid p.10

create fewer security weaknesses. This is a kind of technological approach to the issue of social order rather than seeing it as based on shared moral values.

The 'criminology of the other', by contrast, views criminal activities in the language of warfare and social defence. This is "a criminological echo of the culture of wars and neo-conservative politics"⁸⁰. According to this perspective, the problem with modern society and the penal modernism that it has created "is that they suffered a failure of moral nerve."⁸¹ This criminology is intentionally anti-modern in its themes, and based on absolute moral standards and the assertion of traditional values. According to the ideals of this criminology, criminals are considered as wicked, evil, dangerous enemies and so opaquely monstrous that we must be ready "to condemn more and to understand less."⁸²

This criminology has "reinstated an older, metaphysical conception that depicts the offender as evil-doer, and the criminal act as unconditioned evil choice."⁸³ Garland describes this perspective as anti-modern, in which "social order necessitates social consensus, but it is consensus of a pre-modern, mechanical kind, based upon a shared set of values not a pluralism of tolerated differences."⁸⁴ Those "who do not or cannot fit in must be excommunicated and forcibly expelled."⁸⁵ He concludes that although the characteristics of these two new criminologies are different "they share a focus upon

⁸⁰ *ibid*, p.184

⁸¹ *Ibid*

⁸² *Ibid*, pp. 184-5

⁸³ St Augustine 1955 See *Ibid* ,p.185

⁸⁴ Garland David 2001,p, 185

⁸⁵ *Ibid*

control,”⁸⁶ viewing, crime as normal social fact, and a reaction against the criminologies of penal welfarism.

He accepts that “there are unmistakable resonances here of Emile Durkheim’s account of the repressive, mechanical solidarity of pre modern society.”⁸⁷ However, as I will argue below, he is not ready to develop this Durkheimian perspective and analyse new transformations in American penal policy accordingly. He is not even ready to explicitly bring Durkheim’s theory into account and discuss it in the main pages of the work, as the similarity between criminology of the ‘other’ and Durkheim’s account is indicated only in the endnotes of his book. I would suggest that he has not accorded sufficient weight to Durkheimian approach in this respect, and has mainly relied on a Foucauldian framework in analysing new changes in American penal policies. This has meant that he has not gone on to ask why and how society and politicians have resorted to morality, traditional values and religion, and the impacts of this new trend in the penal sphere.

I hope to show in this chapter that what I have discussed generally in light of Durkheim’s theory of relationship between religion, society, social solidarity and religion can also be true in the particular case of the harsh punishment in the United States. Society has resorted to stronger sacred moral principles as a new foundation of social solidarity because it was perceived that social integration was threatened. I will argue

⁸⁶ Ibid, p.185

⁸⁷ Ibid, p,273 Notes to Chapter 7, Not 55

below that how this argument is close to what Garland sees in the criminology of the other.

Notwithstanding the apparent similarity between Garland's description of the criminology of other and the older, solidaristic, approach in Durkheim's account of punishment and social solidarity, Garland has developed a different perspective. He explains the criminology of the other in terms of exclusion, denial, and avoidance. This aspect of penal practice not only has nothing to do with social integration but is also seen as an antisolidaristic approach. Garland has explained in more detail that exclusion of criminals is, at least partly, a consequence of social demands to do something in response to crime. They should be expelled because of their anti-social behaviour. But he has ignored another, and more important, dimension of this penal policy. This response which is embodied in ideas like 'prison works' and policies like 'three strikes' can be considered as simultaneously exclusive and inclusive. He focuses on first aspect and ignores the latter. He explains that according to this perspective those who do not or cannot fit in must be excluded, but he has not considered the fate of law-abiding citizens. This penal approach excludes a small group of people as criminals but on the other hand has strengthened a social integration that can include the rest of society. Unlike Durkheim he has not addressed how this exclusive approach to criminals could give rise to greater integration amongst other members of society.

Although Garland frequently argues that we have moved away from solidaristic policies of welfare state⁸⁸ he does not address the question of whether an alternative solidarity based on new morality is emerging. In a Durkheimian framework in such a situation society seeks for new foundation of social integration without which society does not exist. For Durkheim sacred moral values and religion function as symbol of society's solidarity. The re-emergence of new solidarity based on higher sacred values and religion is a crucial theme of the present study and can play crucial role in influencing the severity of penal practice in modern society.

This can be illustrated by considering how changes in penal policy have been accompanied by a rethinking of citizenship and the nature of civic responsibility. All citizens are simultaneously considered as owners of the rights and as the subjects of responsibilities. The relationship between government and citizen is being rethought in terms of "a new contract between the citizen and government, based on responsibilities and rights."⁸⁹ This is inclusive in the sense that it sees that a strong and cohesive society can be built "where rights are matched by responsibilities."⁹⁰ The problem is that those who commit crimes are seen as not fulfilling their obligations and cannot be seen as full citizens until they accept their responsibilities. It is not that they are excluded permanently. The fulfilment of the citizen's obligation builds social cohesion. In civil society all individuals should accept responsibilities for the results of their behaviours.

⁸⁸ Ibid

⁸⁹ Peter Ramsay 2006 Unpublicized Manuscript p.7

⁹⁰ Ibid. p.7

The common element in all crimes is that it causes fear and “that can so often limit people’s lives, making them feel afraid of going out or even afraid in their own homes.”⁹¹ Freedom from the fear of crime is then seen as a crucial citizenship right. Respecting other’s feelings and rights and not frustrating their life “by causing them to fear crime is one aspect of helping them to realize their full potential.”⁹² There are no rights without responsibility. Thus, those who break law should be excluded from society. According to this explanation punishment is not only an exclusive approach rather it excludes criminals from society to create a more cohesive society. These principles of rights and responsibilities can be seen as another account of new kind of morality or new civic religion that can give rise to social integration in the new situation of modern society.

For me Garland has endeavoured to explain a deep and structural problem of social disintegration mainly through an analysis of technical apparatuses of crime control technologies. He has approached social disorder in the U.S as a problem of system disintegration, not social disintegration. It seems that in Garland’s problem- solving methodology a partly Durkheimian problem is primarily attempted to be solved according to a Foucauldian and Weberian framework of social control. He is not interested in analysing the harshening of penal practice in American current society in the light of religion as a cultural factor and in relation to religious values as new foundation of social integration.

⁹¹ Home Office 2003, p.13 cited by. Ibid

⁹² Ibid p.8

The materials and sources that are provided by Garland himself can also be analysed in the light of Durkheim's theory of religion, society, social solidarity and punishment but Garland has not sought a systematic and structural connection between these phenomena. Garland's description of social crises in American society, explicitly and implicitly show how social integration has been perceived as seriously threatened. As he argues, neo-liberal politics, market fundamentalism and absolute faith in value of competition and enterprise, brought about greater social inequalities. "The result was a widening of inequalities and a skewed structure of incentives that encouraged the rich to work by making them richer and compelled the poor to work by making them poorer."⁹³ For Garland, the ending of solidaristic politics, the opening of class and race divisions, widespread insecurities, threats of crime and violence, group hostility, multiculturalism, individuals rights, and so on give rise to a more divided society. As he states "a central outcome of politics of the 1980s was thus a hardening of social divisions."⁹⁴ As a result of the decline of the welfare state and of the solidaristic ideas of the Great Society a deeply divided society emerged,

"with one sector being deregulated in the name of market enterprise, the other being disciplined in the name of traditional morality. These new divisions worked to further undermine the old solidarities and collective identities upon which the welfare state had depended."⁹⁵

⁹³ Garland David 2001 p.99

⁹⁴ Ibid, p.101

⁹⁵ Ibid

He has seen that in late modern America there was a "wave of anxiety about the breakdown of family... and the collapse of informal norms of restraint."⁹⁶ It has been pointed out that Garland at times sound like "a modern-day Jeremiah, lamenting the excesses of individualistic culture, longing for a return to a more communitarian spirit and warning of the harsh consequences of continuing social disintegration."⁹⁷ For him, as a result of the pluralism of late modernity, living with difference had become the unavoidable fate of everyone. He contends that complex societies such as America require more organization, that markets can manage economic activities but that "they do little to bring about moral constraint, social integration, or a sense of group belonging."⁹⁸ Going further, neo-liberal policies have reinforced the social stratification and worked to further undermine the old solidarities and collective identities and "the possibilities of interclass identification of mutual sympathy across income divides, of a shares citizenship and mutual regard these became increasingly unlikely."⁹⁹

As a result of these transformations, for Garland, an increase in social problems such as violent crime, street crime and drug abuse is not surprising. But for him these social problems have "eventually produced a renewed obsession with control."¹⁰⁰ For Garland, then, "the underlying problem of order was viewed not as a Durkheimian problem of solidarity but as a Hobbesian problem of order."¹⁰¹ The diversities and multiculturalism give rise to the emergence of behaviours and people that are hardly

⁹⁶ Ibid 195

⁹⁷ M. Feeley Malcolm 2003,p, 127

⁹⁸ Garland David 2001,p.101

⁹⁹ Ibid

¹⁰⁰ Garland David, 2001, p.100

¹⁰¹ Ibid. p.101

tolerable. The response to this is that “new and more coercive policies of social and penal control increasingly targeted these [behaviours and people].”¹⁰² These transformations and “changes in the structure of the family, with increasing female labour force participation, divorce rates”,¹⁰³ and moral individualism present American society with a serious challenge. “These changes contributed to sharply increasing crime rates”.¹⁰⁴

Garland’s description of American society as a divided society and Friedman’s¹⁰⁵ account of that society as a country of immigrants, a country of rolling stones, exaggerative individualism and so on, suggests that the moral foundations of society had been shaken and social solidarity has been seriously threatened. But as I discussed in chapter one, according to Durkheim’s theory of society and religion, society could respond collectively and resort to religion as a series of sacred moral principles to function as a base of social integration. A great deal of crime can be seen as an obvious sign of a demoralized society, a modern anomie in which social and moral norms are dishonoured. In such a situation according to Durkheim, religion can be functional in strengthening moral principles and social solidarity. This is a point that has been perceived by some political commentators as well. For example, Jim Wallis has argued;

“the violence we see in our society today may be for us a wake-up call. Violence is not the problem, violence is a consequence of the problem. We need to understand that violence is not just caused by poverty, it is caused by a profound lack of

¹⁰² Ibid

¹⁰³ Ibid

¹⁰⁴ J.Savelsberg Joachim 2002, p.685

¹⁰⁵ Friedman 1993. PP.12, 13,196,439

hope... So our politics must be rooted in spiritual values, and it must begin to move beyond the labels of conservative and liberal.”¹⁰⁶

Because of his Foucauldian focus, it is arguable that Garland does not give proper weight to the arguments of the American religious right as a solution to the problems of social disintegration, high crime rates and rising violent crime. It is these commentators and politicians who have articulated most clearly a “striking anti-modern movement and serious concern for the themes of tradition”¹⁰⁷

Garland partly attends to Durkheim’s theory of anomie and solidarity but only selectively indicates those parts of Durkheim’s theory which support his idea of more private and public organization as a resolution against rising crime rate, common sense of insecurity, and requirements of crime control policy. For example he states that in *Professional Ethic and Civic Morals*¹⁰⁸ Durkheim “long ago pointed out, social arrangements of this kind pose acute problems of social order and call for the creation of governmental institutions and civic associations that can build social solidarity and ensure moral regulation.”¹⁰⁹ But, as a general criticism of Garland’s work, I would say that he has not fully considered the most developed part of Durkheim’s theory of society in *Elementary Forms of Religious Life*. While, for Durkheim himself this is the most developed part of his theory that all other works should be understood accordingly. For

¹⁰⁶ Wallis Jim, 1994

⁶⁰ Ibid

¹⁰⁸ Durkheim Emile 1992

¹⁰⁹ Garland David 2001,p.101

me without considering this major work of Durkheim his theory cannot comprehensively be understood.

Garland is aware of "the demand to get back to basics"¹¹⁰, to restore traditional values such as "family values,"¹¹¹ the demand of ending "liberation licence in art and culture"¹¹² and condemnation of the immoralities such as "the new sexual morality"¹¹³, "a strikingly anti modern concern for themes of tradition"¹¹⁴ and increasing movement of "American religious right"¹¹⁵, but he has not systematically addressed these themes in relation to religion and harsh penal policy in U.S. He witnessed "the conservative call for a return to moral discipline and traditional values,"¹¹⁶ he accepted that these movements "did result in a renewed discipline and a tightening of control."¹¹⁷ But for him these approaches mainly affected poor individuals and marginalized communities. As will be discussed below the powerful present of religious ideas a cultural phenomenon, religious groups and their involvement in political area and policy making in American society, return of this society to traditional and religious values as a new base of social integration and generally the role of religion in new changes in American penal policy have not attracted Garland's attention.

The present study attempts to argue that additional variables such as religion should be considered. "Understanding America without understanding religion would be like

¹¹⁰ Ibid, p.99

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Garland Ibid, p.100

¹¹⁷ Ibid

looking at Switzerland without the Alps.”¹¹⁸ As Kai Eriksson has argued, puritan beliefs “have influenced practices of punishment throughout American history.”¹¹⁹ As Savelsberg contended the “current religious movements in the United States, especially among fundamentalist and evangelical christens, so represent attitudes toward punishment that closely resemble those of puritan believers.”¹²⁰ Public opinion researches have shown that these groups of Christians believe strongly

“in the innately bad character of offenders, in eternal condemnation, and in the justification of retribution [they more likely support] capital punishment, harsher courts, tougher laws, corporal punishment of children, and determinate punishment.”¹²¹

I do not claim that Evangelical movements make modern American criminal law, but these perspectives can be traced in the new culture of control. “Jacobs and Carmichael found a clear association between the strength of evangelical Christian group across U.S. and the intensity of punitive policies in these states.”¹²² Savelsberg concludes that, “we thus identify close parallels between early puritan deployment patterns, current belief systems of conservative protestants, and recent innovations in (American) criminal justice.”¹²³ As a result, religion whether as a cultural factor or foundational element

¹¹⁸ Guinness Os, 1994

He argued that, As Peter Berger puts it, one of the odd things about America is that she is a nation with a people as religious as India, and a leadership as secular as Sweden. In other words, the leadership in America is disproportionately secular.

¹¹⁹ Eriksson, Kai. 1966. p.198

¹²⁰ J. Savelsberg Joachim. 2002, P.697

¹²¹ Ibid

¹²² See Jacobs David, and Jason T. Carmihach. 2001 Ibid. p.699

¹²³ Ibid

should be part of every comprehensive investigation of relationship between society and punishment.

IV Political institutions, Bureaucratic organization and punishment

As I tried to show in my discussion of Weber, particular features of a developed bureaucracy lead to a dehumanised criminal justice system. The more perfect the bureaucracy, the greater the success in eliminating emotional and irrational elements from official business. Bureaucracy is a powerful obstacle in the trend toward populist penal policy. Bureaucrats act based on their professional and expert considerations, not political credibility or public support. The media in countries, like that of the USA, frequently and horribly report on crime yet European politicians have less opportunity to manipulate the fear of crime as the European state apparatus remains relatively "autonomous, largely steered by bureaucracies that are far more insulated from democratic pressures than are American bureaucracies."¹²⁴

In this context bureaucracy faces two principal pressures: that imposed from inside, by experts, for more effective methods, and that from outside, through considerations of budgets and resource. The heavily bureaucratic systems of Germany and France, for instance, largely immunise criminal justice against public instincts and pressures. In both countries, the tension between democratic demands and bureaucratic control result in situation whereby, "bureaucrats have succeeded in keeping control of the punishment process."¹²⁵ If Americans punish more harshly it is because the administration of penal practice in this country is more given over to democratic politics.

¹²⁴ Whitman 2003, p. 199

¹²⁵ Ibid., p. 15

The death penalty is an illustrative example. "There is always majority opposition to abolition of death penalty in every country. American is not distinctive in this,"¹²⁶ but what makes America distinct is that there is an easier translation of collective sentiment to punishment. "There is, in fact, an intimate nexus between the politics of mass mobilization, unchecked by bureaucracy, and the making of harshness in criminal punishment."¹²⁷ Equally, the impact of mass media on public policy varies considerably across various countries, at least partly because of this reason.

The position of administrative institutions in power relations and power distribution, however, is not as simple as suggested above, as the role of bureaucracy in America's multi-layered government is more complicated than in other industrial countries. A federal version of the state, the complexity of multi-level governance, policies, and multiple divisions among institutions, makes investigation of this area complicated. Here I can look at this question in very general terms.

Political leaders in America have recently tried to strengthen their control over institutions that work in the public service. They have tried to reduce the role of administrative institutions through various tactics. The Government Performance Result Act, for example, "is to a great extent, an instrument for politicians (especially congress) to assert their control over public policy and administration."¹²⁸ Also, other agencies like

¹²⁶ Ibid., p. 200

¹²⁷ Ibid., p. 15

¹²⁸ Peters 2001, p. 173

General Accounting Offices that report to Congress, are instruments for Congress to supervise public institutions.

More generally, what makes political and bureaucratic power-relations in America different from continental countries is the presence of Congress and its characteristics in the political system. In the parliamentary system, the principal struggle is between bureaucrats and their ministers, while in the US the most important conflict is between congress and administrative establishments, as "congress is eager to exercise effective oversight over the public bureaucracy."¹²⁹ Although there are still public servants at the federal level involved in policy-making, "political leaders appear to have resumed more their presumed role as the drivers of change within the Federal level."¹³⁰ Nowadays political leaders are considered more as sources of innovation in the generation and propagation of policy and administration. Budget process must be approved by congress, which "provides congress with yet another crucial level of control over the bureaucracy"¹³¹ in the United States.

However, if, in general in the area social policy there is a tendency to decentralise control over policy-making and law enforcement, the opposite is true of American criminal justice policy. Federal government has tried to have a stronger presence in policing and law enforcement. In particular, state plays a significant role in funding local police activities.

¹²⁹ Ibid., p. 173

¹³⁰ Ibid., p. 176

¹³¹ Ibid.

For example (during Clinton administration), the Federal government has extended its own criminal code to include a number of crimes that had been the concern of state and local government, and has established very severe penalties for violating those laws.¹³²

In consequence, it can be said that these transformations have been very much “a way to put politicians back on top, and administrators more on tap.”¹³³ Moreover, in addition to the political concerns that tend to keep bureaucracy under control, “in comparison to other industrialized democracies [...] the United States bureaucracy appears to be much smaller and leaner. It relies on the private sector to deliver goods and services.”¹³⁴ What will be discussed here in terms of privatization, industrialization and the commercialisation of crime control can be considered as signs of the weakened presence of bureaucratic organizations in American’s penal practice.

The above argument should not lead us to the conclusion that there is no room for bureaucracy and bureaucrats in the American criminal justice system. Although their involvement has changed, they still have powerful presence in this sphere. For a better understanding of this issue, the role of bureaucrats in the area of penal practice will be studied at two different levels: penal policy formation and the enforcement of policy. In the former, the characteristics of political institutions, their relations to public attitudes,

¹³² Ibid., p. 177

¹³³ Ibid., p. 173

¹³⁴ Meier Kenneth J. 1997, p. 193

and their control over administrative institutions give rise to a more populist penal policy. Political institutions are more affected by public sentiments than by professional and expert considerations. They are under less pressure from professional bureaucrats.

As we saw in the discussion of actuarial justice, criminal justice in modern countries has its own particular requirements and demands. These professional understandings are crucial obstacles to the simple translation of public demands to penal policy as they work through their own instruments, and styles. The organizational and bureaucratic characteristics of the criminal justice system give rise to their own particular culture. The criminal justice system can be considered as a more or less isolated sphere, governed by its own special principles and managerial goals. Even in a punitive and expressive penal system like America, prison officers, probation officers and other specialized staff are not just instrument of political parties or policies. Modern organizations, like prisons in the United States, as a highly developed and complex industry, have a degree of immunity against social and political forces.

One of most striking developments in criminal justice has been the movement toward professionalization: "If we take a long-term view of the criminal justice system, from its beginnings in the colonial past to the end of the twentieth century, this (professionalization) is surely one of the master trends of the entire period."¹³⁵ Although the presence of the jury in the courts and election of judges who sit in criminal court through an elective system make American criminal justice comparatively different from

¹³⁵Friedman 1993, p. 67

its European counterpart, other parts of the criminal system have moved markedly toward professionalization. High crime rates, professional criminals, and the culture of mobility, and sophisticated methods of committing crime, required professionals in criminal justice area. "Hence the need for police, detectives, prison officials, medical examiners, forensic scientists, and in general, a growing army of criminal justice workers."¹³⁶

Victory in the war against crime required the trained, equipped and professional officers. It is true that indeterminate sentences are not common in the U.S.A, but the rehabilitative system is not totally abolished. Correctionalist methods and apparatuses, for example probation officers and juvenile systems of justice, are still in use. "Social and psychiatric experts are still employed to prepare social inquiry reports, provide diagnostic services, and to help manage and treat offenders."¹³⁷ Strategies of classification, identification, evaluation and solution have not been removed. Their credibility has been weakened but has not disappeared.

Whiles more than two million are incarcerated and more than six million of people in America are under direct state management, control considerations and the industry of crime control cannot be ignored. The high number of prison staff, probation officers, social workers and other professionals in the criminal justice sphere have led to a huge and complex industry, that can, in itself, affect the area of policy making and the determination of penal practice. Needless to say, these of experts pursue their function in accordance with their own mentality and professional culture which, in turn, affects

¹³⁶ Ibid., p. 209

¹³⁷ Garland 2001, p. 170

culture of penal practice. Thus, if the role of bureaucracy has become limited at the level of politics and policy formation, bureaucracy has preserved its position in the enforcement of punishment and in dealing with criminals. In the contemporary American penal system this huge bureaucratic institution is an unavoidable social fact.

Categorization, professionalization and presence of experts in the incarceration system have led to more bureaucratization because, as mentioned in chapter 2, the requirement of technical qualification in administrative organization has been an ever-increasing necessity. This remains the case, notwithstanding the increasing privatization of US criminal justice institutions.

V Privatization of crime control

The industrialization and privatization of crime control is a remarkable trend in American society. Fear of crime and the sense of insecurity paved the way for a kind of privatised and informal crime control. "People were not satisfied with the protection of the state and its law, they privatised protection and created a private regime of law."¹³⁸ This can be considered as a modern form of reaction against criminal behaviour. If in ancient societies individuals had to protect themselves and react against all wrongdoers due to the absence of governmental forces or the lack of nation -state, in modern societies the public are involved in preventive and punitive actions according to the new conditions of social life. Dealing with crimes and criminals is delegated by the public to professional agencies and governmental institutions, but in the case of their inefficiency the public retain the power to re-enter the process. Thus, the dividing line between the private and public sector, in which crime control was considered as solely a governmental task, has become blurred. Various commercial, industrial organizations and other elements of civil society have entered the crime control process, and crime prevention efforts have spread beyond specialist governmental organizations.

Thus, for example, the private commercial security industry undertakes, to provide "the hardware and protective services"¹³⁹ to produce more security in society. The policing and construction of the prison have become a mixed economy of the public and private sectors. In this society, "burglar-alarm companies were flourishing; [...]

¹³⁸ Friedman 1993, p. 452

¹³⁹ Garland 2001, p. 18

self-defence seminars were springing up like weeds; and [...] thousands of people were buying car phones,”¹⁴⁰ and so on. “The recurring message of this approach is that state alone is not, and cannot be responsible for preventing and controlling crime.”¹⁴¹

The project of ‘responsibilizing individuals’ and private sectors of society has several advantages for the state, as it was no longer the sole institution charged with crime control. This strategy reduces the costs of crime control programs. Moreover, this was an “attractive strategy for criminal justice executives hoping to avoid being blamed for the shortcomings of their organizations.”¹⁴² Governmental penal institutions could attract social support for their penal policies. Those groups that had the resources, and were not dependent on state agencies, selected the new measures of control. Various tactics of reducing the opportunities for crime, such as teaching effective security and establishing residential communities developed in the private sector, and were supported by the state. The demand state of the victim movement for more effective policy can also be regarded as part of the process of private involvement in penal practice.

Commercial institutions regarded this situation as an opportunity for success and profit. Security devices, intruder and car alarms were produced for the public. Urban planners, architects, and construction companies began to “adapt their designs to enhance the level of security that they offered to clients and residents.”¹⁴³ The private sector

¹⁴⁰ Friedman 1993, P. 452

¹⁴¹ Garland 2001, p. 126

¹⁴² Ibid., p. 127

¹⁴³ Ibid., p. 162

performed its particular model of sanctioning of supervision, excluding, shaming and scolding in their own residential areas.

The expansion of the 'prison industrial complex' is another feature of privatization of crime control in the United States. The USA has the largest number of private prisons in the world. "One of the fastest growing sectors of the prison industrial complex (in this country) is private corrections companies."¹⁴⁴ The emergence of a 'prison industrial complex' over the last two decades reflects "the increased importance of private interests in criminal justice policy."¹⁴⁵ This which has been described by critics as 'punishment for profit', becomes a factor of harsh penal practice because, the prison industrial complex can grow only if more and more people are incarcerated. Three Strikes, and mandatory minimums such as harsh and fixed sentences without parole (argued above) "are two examples of the legal superstructure quickly being put in place to guarantee that the prison population will grow and grow and grow."¹⁴⁶ Critics have argued that privatized prison companies have an interest in increasing prison populations as they have little motivation to implement effective methods for dealing with prisoners. Prisons are considered as a source of jobs and a source of tax revenues. The more arrests and convictions there are the more profits will be achieved from crime. "Low pay and, consequently, high attrition has often led to grossly under-qualified and inexperienced staff"¹⁴⁷, which in turn damages rehabilitative programs and could lead to harsh punishment. As result the 'commodification' of crime control and the creation of a

¹⁴⁴ Goldberg and Evan, 2005

¹⁴⁵ Cooper and Taylor, 2005, p.504

¹⁴⁶ Goldberg Eve and Evan Linda 2005

¹⁴⁷ Cooper and Taylor, 2005.p.505

“substantial private corrections industry, plus the emergence of a host of other technological and industrial interests who profit from penal expansion, makes any reversal (or even slowing) of penal growth extremely unlikely.”¹⁴⁸

Both processes of responsibilization crime control and privatization of prison industry contribute to the severity of penal practice in US, but I will show that these developments are not strong enough to provide a complete explanation of harsh punishment in the US. In one sense, privatization of crime control can be considered as a result of social demands for a comprehensive policy against crime. The private sector entered the area because of shortcomings of official facilities and practices. Thus, privatization of crime control should be analyzed as an effect of harsh penal policy not as a cause of it.

¹⁴⁸ Jones 2002, pp. 398-9

VI Politico-Cultural Contexts

Political ideologies and cultural factors such as mentalities, sensibilities, public opinion, and religion are also influential elements in shaping penal practice. In particular, in democratic countries like America, variations in social values can easily translate into the criminal justice system. A culture of victim support, for example, that views criminals as enemies of the society, may lead to a harsh penal approach to offenders. The attack on rehabilitative ideas was not only a matter of discontent with technical and professional responses to punishment (or of success measured in terms of rates of recidivism). It was part of broader change in political, correctional and social culture. I will try to show how cultural elements like sensibilities, mentalities, religion, and public opinion changed in America, and how these transformations were reflected in penal practice.

Cultural conceptions are dynamic and sophisticated phenomena and cannot readily be categorised or separated out. For example, mentality as a cultural phenomenon, itself, could cover a wide area of intellectual and emotional subjects such as political, philosophical, religious, scientific, moral, prejudicial issues and so on. Some level of interweaving and interaction can be seen between these social phenomena. As we have seen in the second chapter, ways of thinking are closely related to ways of feeling. So emotional aspects of culture are barely separable from its cognitive features. Religious conceptions of crime and punishment, as we will see in this chapter, can give individuals feelings of hate or sympathy for criminals and affect penal practice in a society.

Public opinion can be considered as an outcome of current mentalities and sensibilities in a society. Sensibilities are the result of various historical, cultural and social events over time. Having exact definitions for these complex phenomena, and drawing a clear boundary between them is extremely difficult and not my concern. However, this does not mean that there is neither distinction nor similarity between these cultural themes, or that their independent identification is impossible. Following the discussion chapter two, I will introduce a brief explanation of each conception that I have chosen, and study its relationship with policy-making and punishment. Before doing so I shall say something about political considerations, institutions and penal policy to see how crime and punishment became politically significant, and therefore affected the shape of penal practice in the USA.

VI-1 Institutions, Politics and penal policies

Penal practice became politically significant in the last quarter of the twentieth century in the USA. Over this period, high crime rates, movements for victims support, public fear of crime, lack of confidence in the criminal justice system and in the state's capacity of control crime, and a perceived lack of security, all had significant implications for state authorities and penal policy. "There were louder and louder outcries that something had to be done."¹⁴⁹ Politicians had their own concerns as the

¹⁴⁹ Friedman 1993, p. 452

aggravation of critical sentiments through the mass media and electoral competition urged them to react.

Crime and punishment are among the most sensitive and important social problems that face American society. As a social phenomenon, crime is capable of creating a level of public anger that “can reasonably be described as harsh.”¹⁵⁰ Criminal justice in this country is not an autonomous system because it is under continuous external pressure from the outside. A catastrophic increase in crime after the sixties put politicians under enormous pressure to provide a suitable response. For politicians in democratic countries like America “acting in the context of electoral competition, policy choices are heavily determined by the need to find popular and effective measures that will not be viewed as signs of weakness or abandonment of the state’s responsibility to the public.”¹⁵¹ Political actors are concerned more with the anxiety and outrage provoked by crime than controlling crime. Criminalization, penalization, sentencing guidelines, truth-in-sentencing policies, and three strikes law are expressive penal policies that were selected in response to public concerns.

Over the course of thirty years, crime and punishment have become highly charged electoral issues, because they are located at the centre of public attention. Opposition parties try to show their ‘toughness’ on crime to increase their credibility and popularity. Of course there are still many people who support a more rehabilitative system and believe in more humane ways of punishment, but the predominant demand is

¹⁵⁰ Warr Mark 1995, p. 296

¹⁵¹ Garland 2001, p. 111

“for tougher laws, more and longer sentences, more and bigger prisons.”¹⁵² Political actors have eagerly manipulated these views and sentiments: “cast your ballot for x and he will light a fire under the system.”¹⁵³ Politicians disregard whether crime responds to the severity of punishment or not, and respond solely to public anxiety, their credibility, and their popularity. “The practical effect, once the political passion had spent itself on getting the change, [was that] the polity somehow lost interest.”¹⁵⁴ Such concerns provide a context for a new political discourse in which politicians compete for tougher punishment. “In the choice of policy response, those that can most easily be represented as strong, smart, and effective or expressive are most attractive.”¹⁵⁵

As a result, in order to win elections and thereby to govern, politicians have addressed crime issues in polemical and stereotyped ways. Because it is difficult to oppose polemical claims about emotional subjects with sound arguments, American politicians compete to show who is tougher.¹⁵⁶

As in most democratic countries, America's politicians feel they must respond accordingly. In a majority rule model policy should ‘directly reflect public opinion.’¹⁵⁷ Once the death penalty, for example, became very popular, ‘hardly any politician dares oppose it’¹⁵⁸ because of majority support for death penalty. On the other hand, this social

¹⁵² Friedman 1993, p. 452

¹⁵³ Ibid., p. 464

¹⁵⁴ Friedman 1993, p. 308

¹⁵⁵ Garland 2001, p. 111

¹⁵⁶ Tonry 2001, p. 524

¹⁵⁷ Norander 2000, p. 774

¹⁵⁸ Friedmann 1993, p. 320

context can be considered as a golden opportunity for America's political actors, because in a politically stable country like the U.S.A, with extended national parties, politicians need issues that have a relatively broad appeal

However, whether this is the manipulation of collective sentiments for political concerns or an honest "attempt to give democratic expression to public feeling, the outcome is the same"¹⁵⁹ - a punitive, expressive and populist penal practice. "What sets America apart is the relatively easy translation of majority sentiments into policy."¹⁶⁰

VI-2 Politico-Judicial institutions and public demands

America's political and judicial institutions were probably more ready to be affected by public pressures than other democratic countries. Closer attention to the position of these establishments may better show this reality. Universalistic personalism in members of American congress makes them "relatively independent from their political parties, but personally accountable to their constituency"¹⁶¹ and means they are more dependent on voters in politicised issues. Executive institutions and political actors are closely dependent on public support. "The administrative leadership is more strongly exposed to public opinion given the presidential election by nationwide, popular votes,"¹⁶² as opposed to the parliamentary elections of some European countries. Relatively similar conditions can be seen in the judicial system of the United States.

¹⁵⁹ Garland 2001, p. 134

¹⁶⁰ Whitman 2003, p. 200

¹⁶¹ Savelsberg 2004, p. 931

¹⁶² Ibid., p. 931

Most judges and prosecutors in the U.S. "are either elected or nominated and confirmed in political processes."¹⁶³

Such political and judicial institutions brought about conditions that make the American criminal justice system closely related to public demands. Activities of these policy makers are directly or indirectly affected by public attitudes. For example, as after President Ronald Reagan was shot and seriously wounded in 1981 by John Hinckley, the jury of the federal district court declared that Hinckley was "not guilty by reason of insanity."¹⁶⁴ This verdict gave rise to a huge wave of protest. Around 80 percent of the public were against this verdict. It was believed that this kind of defence would lead to individuals committing the same crime again. All this may seem nonsense of course, "but congress heard the thunder and saw the lightning clearly,"¹⁶⁵ and in 1984 changed the law, so one could barely resort to this defence in the federal courts. This example clearly shows the impact of public opinion on penal policy makers.

This is true even of the US Supreme Court- an unelected and apperantly democratically unresponsive institution. As has been argued: "Supreme Court decisions not only correlate with public opinion but are directly influenced by public opinion."¹⁶⁶ Judges are members of society and more than lay people are aware of attitudes that prevail in the community. They are "broadly aware of fundamental trends in the ideological tenor of public opinion, and at least some justices, consciously or not, may

¹⁶³ Ibid

¹⁶⁴ Ibid., p. 405

¹⁶⁵ Ibid., p. 405

¹⁶⁶ Norpoth, Segal, Mishler and Sheehan 1994, p. 711

adjust their decisions at margins to accommodate such fundamental trends.”¹⁶⁷ In the USA judges are indirectly elected by the people, because “the people elect president and the president selects the justices with advice and consent of the senate.”¹⁶⁸ As a result it can be said that public opinion can both directly and indirectly influence sentencing.

As result of these the new penal policies can be studied in the light of these political forces. The introduction of ‘zero tolerance policy’ for minor offences, after the election of Governor George Pataki and Mayor Rudolph Giuliani in 1994 in New York State, for example, shows how this politicized aggressive approach towards wrongdoers could be implemented.

The term zero tolerance has a longer history than in the policing of New York City. The origin of this approach can be traced to Reagan’s ‘war on drugs’ in the 1980s. American politicians were under public pressure to ‘do something’ about the drug-trade which, at that time, was perceived as a “massive national threat.”¹⁶⁹ The policy adopted was “interdiction at the source, the arrest of users, and pushers, draconian punishments, and, on the official level, no understanding, no mercy, no letup in the war.”¹⁷⁰ Federal drugs policy took a zero tolerance¹⁷¹ approach and “sought to create a ‘drug-free America’ by the year 2000.”¹⁷²

¹⁶⁷ Ibid

¹⁶⁸ Ibid

¹⁶⁹ Friedman 1993, p. 356

¹⁷⁰ Ibid

¹⁷¹ The effects of zero tolerance policy in American criminal justice system and its relation with religion will be discussed in more details latter in p, 222

¹⁷² Jones and Newburn 2002, P. 188

This openness to political pressure also facilitated the adoption of sentencing guidelines. From 1970 many states started to think about sentencing guidelines to abolish indeterminate sentencing. The guidelines movement bridged the American political divisions and both wings of public opinion supported this movement. Harshness of punishment, of course, was not an essential result of this movement, "it is merely a consequence of the fact that the movement coincided with the rise to electoral success of law-and-order conservatives who succeeded in shaping other statutes."¹⁷³ But this movement had other implications, as it aimed "to take sentencing decision out of the hands of the punishment professionals such as judges and prison professionals."¹⁷⁴ It was a profound change in American penal policy. Indeed "the guidelines are symptomatic of a larger shift away from the judicial and toward the legislative in American criminal law."¹⁷⁵ It was a step towards the democratisation of the American judicial system. Moreover, it should be viewed as a movement in the United States that increased connections between public opinion and penal policy. It took penal policy out of the hands of judges and gave it to the public, "which means that the guidelines inevitably lend themselves to the worst excesses of American democracy."¹⁷⁶ At the same time the codification movement cut the power of judges to create new common law crimes. "More and more states passed comprehensive penal codes; by implication, anything not listed was simply not crime."¹⁷⁷ As Dubber firmly announced at the end of twentieth century in America: "the age of common law is over. Penal law now is made by

¹⁷³ Whitman 2003, p. 55

¹⁷⁴ Ibid., p. 55

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ Friedman 1993, p. 65

legislators, not in court opinions by judges.”¹⁷⁸ This was another process that paved the way for the translation of collective sentiments into penal practice through a political process.

It seems to me that one may still ask whether a populist penal system is essentially equal to a harsh justice. Is it the case that involvement of social sentiments in penal practice, politicization of crime and punishment, the accountability of political institutions and application of public demands in the legislation process, the close relationship between the elected and unelected judicial institutions and public opinion and so on, must give rise to an aggressive approach towards criminals? My answer to above questions is not necessarily in the affirmative, because historical experiences and observations from other democratic countries do not confirm the correlation between democracy, involvement of public opinion, social sentiments and social demands on the one hand and a harsh justice system on the other. As we saw when looking at Elias and Spierenburg in chapter three, the outcomes of social sentiments on penal policy can be quite the opposite: the elimination of cruel justice and harsh penal practice. What then is source of these harsh reactions?

As I suggested earlier in the second chapter, there is a kind of correlation between social forces and penal practice, but this argument by itself does not show that social passions must automatically give rise to harsh penal policies. The role that these social forces play in the determination of a brutal or gentle penal system depends largely

¹⁷⁸ Dubber 1999, p. 50

on content of these social emotions. As Durkheim told us, it depends on the godly or humane content of collective consciousness. In his view the severity of a punitive reaction mostly depends on how deeply held are the violated collective beliefs. In others words it depends on the degree of sacredness of those cultural conceptions Durkheim argued that penal practice in traditional societies had been harsh because collective sentiments in those societies had been religious in character. I do not claim that religion can explain all the transformations that have occurred in American penal policy during last thirty years, but I do want to argue that without addressing this powerful social and cultural element one cannot analyse the subject adequately. This is what is missing in conventional explanations of punishment in modern societies in particular American penal policy. Religion has not been seriously applied as an analytical tool in social understandings of punishment. The role that religion could play in socio-political life and the aggravation of public attitudes toward criminal activities and harsh penal practice in modern world has been ignored.

VI-3 Politics, Religion and punishment

The entrance of religion into the arena of politics is a crucial factor in the cultural and political aggravation of American penal policy. After a long period of separation between state and church in western countries, including America, a new trend in the relationship between these phenomena has appeared in the USA. One of the unquestionable realities of current American society is that there are an extremely high percentage of people that believe in God. Virtually all Americans, according to Gallup

Princeton Religion Research Centre (PRCC 1996), say they "believe in God or a "universal spirit", 96 percent in the most recent report,"¹⁷⁹ a figure which has remained stable during recent years.

It is obvious that belief in God, by itself, has no effect on policy-making. One crucial issue in this regard therefore is the political involvement of religious groups. In other words the question is whether there is relationship between these religious groups, their values and political conduct, and policy-making in general and penal policy-making in particular? A short look at America's approach to these subjects during the last third of the twentieth century can help to answer that question. Specifically, I want to determine whether American people support an accomodationist view, and believe that the government should support America's religious heritage in their decision-making, or whether they support a separatist view "in support of the traditional Jeffersonian 'wall separation' between church and state,"¹⁸⁰ and refuse to allow religious ideas and sentiments to enter penal practice. Investigations of these issues has demonstrated, that since 1950 the American people have gradually accepted the political involvement of religious groups, and a closer relationship between religious thought and penal policy.

In 1968, Americans appeared to have supported church involvement in social issues, but they did not have a favourable attitude towards the "direct involvement of religious figures in electoral politics."¹⁸¹ As mentioned above, however, despite short-

¹⁷⁹ Bishop 1990, p. 2

¹⁸⁰ Servin-Gonzalez and Torrez-Reyna 1999 p. 592

¹⁸¹ Ibid., p. 593

term fluctuations, recent investigations show a progressive movement in favour of the involvement of religious groups and leaders in American politics. By the late 1980s, a solid majority of the public believed that religious ideas had become too influential in politics. In 1990 a majority of Americans voted for the Republican candidate in spite of the involvement of conservative Christians in the Republican Party. This indicates that, to a certain extent, the public have accepted the political involvement of religious groups. Therefore, religious institutions moved "from the margin to the mainstream of national politics."¹⁸² The trend toward increased religious involvement in politics area is also evident in presidential elections. The 1993 Gallup poll indicated that 72 percent of American people said that they would not vote for a presidential candidate "who did not believe in God."¹⁸³

Furthermore, socio-political investigations in American society suggest that the role of religious doctrine in political conduct is greater than was previously thought. Before dealing with this question, it should be mentioned that in contemporary America, traditional divisions between Christian and Jews, Catholics and Protestants, have become politically less important than the distinction "between religious "conservative" and religious "liberal."¹⁸⁴ This means that purely religious conflict has been transformed into a kind of competition between political understandings of religion. Nowadays, religious affiliation has a strong and direct impact on American political behaviour, in particular on partisanship. Catholics are more likely than Protestants to vote Republican. It is possible

¹⁸² Ibid., p. 596

¹⁸³ Ibid., p. 597

¹⁸⁴ Layman. 1997, p. 288

that the loyalties of secularists and religious liberals to the Democratic Party or religious traditionalists to the Republican Party may grow strong enough that these groups may support their parties' candidates regardless of their policy positions.¹⁸⁵ The involvement of religious groups in political activities, and the increasingly presence of religious ideas amongst politicians and policy makers, directly influences penal policy in the USA. The criminalization of abortion, and other 'immoral' conduct are signs of this movement.

But there remains the crucial question of how one can explain the appearance of religion as an active social force in American society. I will attempt to answer this question in light of a Durkheimian theory of religion and society. According to Durkheim, religion operated as a powerful force in traditional society. But the reason for the reappearance of religion as an influential social force, and its role in social solidarity in a modern society like America, can analysed in a Durkheimian framework.

Durkheim's main concern was answering the following question: what are the bonds which unite men one with another? Solidarity, for Durkheim, is the source of social life - for the same reasons that morality, as a ground of social integrity was a key point in his writings. This can be considered as a kind of grounding theory on which the other hypotheses are drawn. For him, moral constraints are the very essence of collective life - society and morality are one. "*Moral*" is often synonymous with '*social*' in Durkheim's work."¹⁸⁶ Moral rules, for him, are the spirit of social order and ties of social solidarity. The durability of moral ideas and moral rules of behaviour are inseparable

¹⁸⁵ Ibid., p. 307

¹⁸⁶ Shilling and Mellor 1998 p. 196

elements of his sociology. Morality, for him, is a comprehensive system of prohibitions, and bonds that preserve social integrity.

Likewise, he asked, to what social needs does religion correspond? In other words, what are the social benefits of religion? He argued, "that nearly all the great social institutions were born in religion,"¹⁸⁷ and it is only religion that has the potential to re-create and strengthen these phenomena. It was because of this that he worried about the weakness or lack of religious consideration in modern societies.¹⁸⁸ The effect of religious beliefs for him is the "re-creation of moral being"¹⁸⁹ and the most basic function of religion is the creation and re-creation of morality as a base of social integration. He argued that the main and "sole purpose of religious ceremonies is to arouse certain ideas and feelings, to ... join the individual to society."¹⁹⁰ Social cohesion is the other utility of religion. It can be said that the most important reason for his attachment to religion is this the effect of religious ideas and practices on social unity, because social solidarity was his lifelong concern. "What makes such a society a 'society' (for Durkheim) at all is the fact that its members adhere to common beliefs and sentiments. The ideas which are expressed in religious beliefs are therefore the moral ideals upon which the unity of society is founded."¹⁹¹

¹⁸⁷ Durkheim 1915, p. 421

¹⁸⁸ "The former gods are growing old or dying, and the others have not been born." Ibid p. 429

¹⁸⁹ Ibid., p. 352

¹⁹⁰ Ibid., p. 382

¹⁹¹ Giddens Anthony 1971, p. 112

Religion, for him, has several functions, but he refers to morality as the most important. As I tried to show in the second chapter, Durkheim sought to find the origin of religion in the sense of "the ever-present causes."¹⁹² For Durkheim, society has all the essential conditions and necessary forces to produce religious sensation.

Society in general, simply by its effect on men's minds, undoubtedly has all that is required to arouse the sensation of divine. A society to its members, in primitive societies, had been what a god is to its faithful.¹⁹³

For him "the idea of force is of religious origin."¹⁹⁴ These forces are, a translation of common principles and religious forces. According to Durkheim, society has all the essential elements to produce religious sensations and the requirements of creation of sacred being, that society and religion are highly similar. These similarities between religion and society are a sign of their unity. Indeed, for him, spiritual powers are none other than the shared values in society. Religion is a translation of social reality and the "real function of religious rites is to serve moral ends."¹⁹⁵ As Giddens has argued, Durkheim sees religion as "*society* becoming conscious of itself, although in a symbolically transmuted form."¹⁹⁶ Religion then is the translation of society into symbolic language.

¹⁹² Tendzin N. Takla; Whitney Pape 1985, p. 79

¹⁹³ Durkheim 1915, p. 206

¹⁹⁴ Ibid., p. 206

¹⁹⁵ Ibid., p. 374

¹⁹⁶ Giddens 1995 p. 20

In these terms the movement toward tradition, morality and religion in the United States, requires careful analysis and consideration. The U.S.A "was a country of immigrants, a country of rolling stones; it was also a country in which it was possible to rise in society - and also to fall."¹⁹⁷ During the twentieth century, America underwent a profound shift in social conditions. "Slowly gradually, the twentieth century broke with the past. It became the century of the self"¹⁹⁸ - the century of exaggerative individualism. This new concept of unrestricted freedom of personality and self was found form in social movements like feminism, the sexual revolution, and the civil rights movement and so on.

Various segments of American society had established the right to administer their own group. Different groups of people, classes, races and tribes looked for the right to run their own social affairs: "old rules and arrangements fell,"¹⁹⁹ and majority culture and higher morality were defeated. In such a society, "authority becomes horizontal, not vertical."²⁰⁰ As a dark side of this social transformation, however, the crime rate increased, and it has been suggested that "a great deal of twentieth century crime can be explained, if at all, in terms of the exaltation of the self, a twentieth century pathology."²⁰¹ The explosion of crime in particular violent crime, indicates that society failed to educate people effectively in superior moral principles.

¹⁹⁷ Friedman 1993 p.12

¹⁹⁸ Ibid., p. 13

¹⁹⁹ Ibid., p. 13

²⁰⁰ Ibid

²⁰¹ Ibid

Friedman argued that the current 'fatal liberty',²⁰² "culture of mobility and the culture of the self are not costless."²⁰³ A mobile society has a background involving the creation of criminals and victims, and in particular fiscal crimes. "Mobility also means, above all, the ripping up of roots, the destruction of fixed, settled ways."²⁰⁴ These profound social and technological transformations, "snowballing for a century, stronger and faster and bigger all the time, have undoubtedly imprinted themselves on American culture and personality."²⁰⁵ Those elements of modern culture that were related to self were taken as crucial factors and in turn, "old 'bourgeois values' get thrown out the window; values such as self-discipline, delayed gratification and restraint."²⁰⁶ In these kinds of situations individuals easily feel free to leave their traditional homes, and move to greener pastures. Also, those who have stayed at home are not free from the culture of mobility; they experience mobility psychologically through the mass media. As a result social, economical and class positions are ripe for real or false transformations. The first can lead to a kind of social ambiguity, the second, crime.

The modern personality gradually became so powerful that it influenced family authority: "[T]he family is crumbling, in all sorts of senses. Traditionalists worry about the decay of the nuclear family."²⁰⁷ Following the disintegration of family authority, decline of traditional authority, exaggerated individualism and choice, "the vulgarity of

²⁰² By fatal liberty probably he indicated to a kind of excessive freedom in American culture.

²⁰³ Ibid

²⁰⁴ Ibid., p. 196

²⁰⁵ Ibid., p. 439

²⁰⁶ Ibid

²⁰⁷ Ibid., p. 443

media messages, the rampant narcissism and consumerism of American society;²⁰⁸ coupled with easy access to guns and culture of social pathology, a wave of crime-overwhelmed society. In late twentieth century America, there was a general sense of insecurity, a lack of immunity from sudden, violent and unpredicted attack. In such a society, "Danger is everywhere and comes from everywhere."²⁰⁹

Contrary to nineteenth century society, which focused on discipline and control, raising self-expression and personal development, American social scientists believed that in the modern America parents are "no longer interested in inculcating moral and religious principles."²¹⁰ Moreover, most criminologists and social experts no longer believe in born criminals or the transmission of bad blood from father and so on. Rather they look for the answer in personality, family and environmental contexts; for them a criminal is a "misraised, mistrained person, unsuccessfully socialized."²¹¹ As previously mentioned, the crime explosion, and growth of violent crime in the United States is considered as a clear sign of the collapse of a system of restrictive values. It shows that society's moral roof is seriously damaged.

The dramatic shift in the American society towards tradition, morality and specially religion during the last few decades can be analysed in light of the Durkheimian understanding of the role of these social structures as bases of social integration. It is believed that what could integrate and preserve society in the past can aid the re-

²⁰⁸ Ibid., p. 445

²⁰⁹ Ibid., p. 454

²¹⁰ Ibid., p. 455

²¹¹ Ibid., p. 455

integration of the community in the modern era, as well. The social disintegration and the destruction of society's moral roof, mentioned above, led to a movement toward strengthening traditional and sacred social values and a conservative politics. Religious ideas and symbols played a crucial role in this regard. Religion as the most common and powerful social force, could play a significant role in solving social disparities and strengthening social solidarity. Once again society became conscious of itself and reinstated religion as an emblem of social integration.

As we saw above, one of the undeniable realities of American society today is that an extremely high percentage of people believe in God. Nowadays, religious affiliation has a great and direct impact on American social and political behaviour. Investigations of these issues have demonstrated that American people gradually began to accept a more expansive role for religion in their social life, and more political involvement for religious groups. The implications of a doctrine of biblical literalism²¹², show that even acceptance of various interpretations of religion may damage social unity. However, this does not mean that American society is going to be as completely a religious society as ancient societies, or that traditional religion has become the only base of social solidarity.

²¹² Conservative Protestants consider the Bible to be the ultimate source of authority and guidance, providing reliable, empirically verifiable, and sufficient truths to guide the conduct of all human affairs, ... in contrast to their secular counterparts., conservative Protestant writers ... attach little importance to the latest findings of social science researchers. Instead, they gauge the usefulness of any non-biblical information by its compatibility with biblical principles, as they are understood within Conservative Protestant communities... In contemporary parlance, *literalism* implies an interpretive strategy that (1) presumes and (2) is committed to sustaining the unity and inerrancy of the text
See: Ellison and Sherkat

But for me, as a result of the social disintegrations discussed above, a trend of reaction toward morality, has given rise to a revival of religious traditions as a new basis for social cohesion in American society. In Durkheimian terms, American society has sheltered under a religious umbrella because it was in a dangerous situation. For example, “[I]n the weeks immediately following the terrorist attacks (September 11), Americans flooded into houses of worship, packing weekend services and engaging in prayer and reflection.”²¹³ Indeed, it is suggested that a new form of Durkheimian mechanical solidarity has emerged in American society.

As Lewis Solomon's work explains, a deep transformation in cultural values and social norms-which were created by factors such as technological progress, shifts in sexual behavior and family structure, the rise of single parent families and economic forces - has led to a “fall of moral standards and the defiance of traditional virtues, which according to [Solomon's] definition includes hard work, diligence, sobriety, frugality, and sexual restraint.”²¹⁴ Such a deep transformation “may cause a destructive impact on society by inflicting a variety of social ills, including juvenile delinquency, drug use, dropping out of school, violent crime, etc.”²¹⁵ American society has tried to find constructive and positive remedies for social decay. Social processes of positive value formation, moral restoration, and spiritual renewal are very complicated. “However, as he (Lewis Solomon) vehemently put into context, ‘religion is perhaps the one force in

²¹³ Rogers 2002, p. 36 See: <http://pewforum.org/publications/reports/lifteveryvoice.pdf>,

²¹⁴ Oliveira, 2003, p. 95

²¹⁵ Ibid

American society that will help promote a cultural renewal’.”²¹⁶ He affirms that Faith Base Organizations can play a *unique* role in solving societal troubles by promoting and rebuilding families and communities.

As has been argued in this chapter, the close relationship between these religious groups and their values on the one hand, and social life, political conduct and policy-making on the other, are signs of social transformation in the USA. Despite short-term fluctuations, recent investigations show a progressive trend to favour religious ideas, religious groups and leaders in American society and politics. As we saw above, by the late 1980s, religious ideas became very influential forces in politics. In 1990, a majority of Americans voted for the Republican Party candidates, in spite of the involvement of conservative Christians in the Party. Therefore, religion increasingly moved “from the margin to the mainstream of national politics.”²¹⁷

As the above argument shows, a shift toward traditional values of order, family, religion and social authority swept American society. As a result “some distinctively fierce American Christian beliefs”²¹⁸ and sentiments have affected American penal policy in the last three decades. Indeed, the revival of religious beliefs and emotions as forceful ideas and sentiments in American society were, at least partly, the results of these social transformations. That wave of backlash in late modern America, which showed serious concern for traditional values - order, family and authority - and put the United States’

²¹⁶ Ibid., p.5 96

²¹⁷ Ibid., p. 596

²¹⁸ Whitman 2003,p. 6

penal policy under heavy pressure were effects of the movement toward a new solidarity. Those values were most clearly articulated by the American religious right, which transformed "as a political force from the mid-1970s onwards."²¹⁹

Nowadays, as result of religious ideas the majority of American parents use physical punishment on their children. There is a link between conservative protestant affiliations and the use of physical punishment "to discipline toddlers and preschoolers and old children."²²⁰ The effects of these conservative values, moreover, have gone beyond the use of corporal punishment by teachers and parents, to the area of penal practice more generally. The overall result of these religious ideas and sentiments has been a tougher approach to criminal behaviour. Such traditional religious and sacred beliefs were strong enough to engender passionate hatred for criminals, and therefore to lead to harsh punishment.

As a result of the entry of the religious outlooks into the sphere of criminal law, there is nowadays no significant distinction between sin and crime in the American criminal justice system. "The identification of disorder with sin made it difficult for legislators and ministers to distinguish carefully between major and minor infractions."²²¹ As Durkheim argued in relation to primitive societies, once collective consciousness becomes more religious in character, so social reactions become more repressive and punitive. This is because an act that violates something that is religious in character

²¹⁹ Garland 2001, p. 99

²²⁰ Ellison *et al* 1996, p. 2

²²¹ Rothman 1971, p. 15

results in vengeance for something that is sacred. The return of retribution to American penal practice “is closely associated both with populist justice and with deep-seated Christian sentiment.”²²² In the new American penal policy, offenders are considered as dangerous and evil. Contrary to continental countries there is a kind of returned to a “quasi-Christian attitude.”²²³

²²² Whitman, 2003, p. 194

²²³ Ibid., p. 201

VII The changing culture of crime and punishment

The history of punishment reveals the dynamic impact of thoughts, moral and emotional forces on penal forms, and documents the relationship between changes of attitudes and shifts in penal practice. I will now examine how these cultural changes have affected modern American penal policy, looking in particular at how changing modes of repression can be an expression of changing perceptions and attitudes.

VII-1 Changing conceptions of criminology, crime and criminal law

A remarkable manifestation of changing thoughts and their effects on penal policy can be found in the transformation in criminological ideas in the United States.

Criminological theories during the post war period were mainly based on psychology and sociology. Crime was considered as a symptom of abnormality and anomie, in individual character or social structure respectively. Criminals were criminals because of their being deprived of education, a job, proper treatment, good family and so on. Thus society and state should offer them correctional treatment and address their psychological or social problems.

On the contrary, however, contemporary criminological theory influences penal policy through a different set of beliefs. New criminological theses have since the 1970s, viewed criminals as rational and free actors who follow their instincts and temptations. From this perspective crime and delinquency are the outcomes of insufficient control. Contemporary criminology views crime as an act that is committed intentionally, and

thus must be suppressed. As it has been pointed out, "This way of thinking has tended to reinforce retributive and deterrent policies."²²⁴ In this theory, criminal disposition is not a crucial issue. Rather, crime is a routine activity that should be managed, and penal policy should focus on preventing criminal opportunities. This aspect of penal practice was discussed earlier in this chapter, in the discussion of actuarial justice and risk management.

Diverse beliefs regarding crimes and criminals lead to diverse strategies in responding to wrongdoers. Considering criminals as normal and free, or abnormal and irrational individuals, give rise to varying penal policies. Responding with 'evil-by-evil', Kant and Hegel's traditional theory, or with Beccaria and Bentham's theory of deterrence, inevitably result in divergent penal policies. The pendulum swung back, in America, toward eighteenth century penal practice, when it was thought that, if punishment is sufficiently severe and certain and the cost of crime is greater than its benefits, crime becomes unlikely.

Different perspectives on justice, morality, human nature and the state give rise to different forms of punishment. If one believes that crime is the result of free choice, rather than socioeconomic poverty one may advocate severe penal policy. Richard Nixon, for example, believed that the cause of crime was "insufficient curbs on the appetites or impulses that naturally impel individuals toward criminal activities,"²²⁵ and "was the first to have the vision and the power to put a program for the systematic and

²²⁴ Garland 2001, pp. 15 - 16

²²⁵ Chevigny 2003, p. 80

comprehensive eradication of criminal threats into action.”²²⁶ The governor of New York State in 1994 emphasized that there is no relationship between social factors and criminal actions. For him “there was no connection between social ills and crime.”²²⁷

Such beliefs encourage a zero tolerance response to minor offences. Unlike the rehabilitationist “who thinks all criminals are at bottom good and therefore curable [,] the incapacitationist thinks they are all bad and incurable.”²²⁸ The abandonment of the merciful version of individualism was an outcome of a version of egalitarianism. In this view, individualism is considered as a kind of discrimination as similar crimes are not treated alike. The idea of dangerousness, on the other hand, viewed certain offenders as incorrigible, and led to a harsh strain of individualism. Accordingly, criminals had to be permanently incapacitated or eliminated, since “the spirit of (merciful) individualization is no longer dominant in America.”²²⁹ As such, merciful individualism has been abandoned in the American criminal justice since the early 1970s.

As I discussed in the previous section, not only is there a close relationship between the state and the church in contemporary America, but religion has also entered into more aspects of social life. Indeed, religious perspectives in the sphere of criminal justice have effectively transformed the process of thinking about crime and criminals. Viewing crime as a sin and criminals as evil leads to particular penal practices. Historically, life in the colonies of America was religious. American society had been a

²²⁶ Ibid

²²⁷ Ibid., p. 81

²²⁸ Dubber 2001, p. 995

²²⁹ Whitman 2003 pp. 52-53

traditional and hierarchical society in which criminal justice was shaped by religious ideas and social structure. These facts of ideology and structure had “shaped types of punishment and the very definitions of crime.”²³⁰ For example, in Massachusetts Pennsylvania and New Jersey religious ideas had a powerful influence on the criminal justice system.”²³¹ Indeed puritan colonies were “governed by the word of God.”²³² There was little or no distinction between sin and crime, and “a religious message leapt out of virtually every page of the early puritan codes.”²³³ The measurement of heresy and blasphemy as serious crimes in the early criminal law Massachusetts is a striking example of a religious system of criminal law. The Bible was considered as a reference in sentencing. The use of shame and shaming punishment- for example lashes on a bare back, or other religious rituals - demonstrate the religious nature of the legal system during colonial periods.

However, the process of religious and moral criminalization tended to reduce, during the course of the eighteenth century. For instance an examination in seven counties in Massachusetts during 1760 and 1774 showed that only “13 percent (of prosecutions) were for religious offences.”²³⁴ Thus, “[T]he post-revolutionary age was an age of reform in criminal justice”²³⁵ in the United States. Codification of the trial, the Bill of Rights, a pessimistic approach to barbarism, grace, and mercy, rationalization and humanization were key indicators of the reformist movement.

²³⁰ Friedman 1993 p. 22

²³¹ Ibid., p. 23

²³² Ibid., p. 24

²³³ Ibid., p. 32

²³⁴ Ibid., p. 54

²³⁵ Ibid., p. 63

However, nowadays, strong manifestations of religious thought are again obvious in American penal policy from the second half of twentieth century onwards. As a result of the entry of religious beliefs into the sphere of criminal law, nowadays there is again no remarkable distinction between sin and crime. The idea of zero tolerance, for example, proposed that minor disorders lead to more serious crime, and reduce the willingness for law abidance in the population. "Others have taken this further and agreed that many of those people involved in more minor disorders and crimes are also likely to be in more serious offences."²³⁶ Thus, police targeted the low-level incivilities, public drunkenness, public begging, squeegeeing and so on. To clean up the space they focused "as much on minor infractions and incivilities as on major crimes."²³⁷ This policy "accompanied by systematic stop and frisk, especially for minority youths (pursued) for the purpose of creating atmosphere of order and surveillance."²³⁸ This policy suggests a get-tough approach towards incivilities and disorders.

This theory recalls Durkheim's idea that, once an act violates something that is religious in character, resulting in vengeance for something sacred, there is no a significant distinction between minor and major crimes. The impact of these primarily religious mentalities and sensibilities are visible in American's political, educational and penal culture as well. This is because, as Durkheim told us, in such conditions collective consciousness and all social values are more sacred in character and therefore minor

²³⁶ Jones and Newburn 2002, p. 186

²³⁷ Ibid., p. 187

²³⁸ Chevigny 2003, p. 81

disorder can be considered as a serious crime. Since all major and minor crimes have in common the violating of sacred moral principles, trivial offences may lead to a disproportionally harsh reaction. The mere breaking or disobedience of highly sacred values is of itself a heinous sin or crime.

VII-2 Changing attitudes toward punishment

As I argued in the two previous chapters, for Durkheim, Elias and Spierenburg transformations in penal policy cannot be understood without having first looked at changes in sensibilities. The dynamic impact of emotional forces on penal policy is undeniable. Civilizing punishment, shifts in sensibilities, and sympathy to offenders led to the abolition of cruel and barbaric forms of punishment, give rise to a gentle way of punishment during nineteenth and twentieth centuries. During the nineteenth century and the half first of the twentieth century, criminals were considered as victims of their social conditions, or abnormal personality.

However, a kind of reversion to the classical or even traditional system of punishment is obvious in contemporary American penal policy. Sympathy for victims replaced sympathy for criminals. The victim movement started with criticism of sympathy for criminals. The proponents of this movement accused the criminal justice system of caring more for offenders than victims. It portrayed a sympathetic image of the poor victim's situation. The picture of an innocent woman, or elderly person raped or

killed is "in short, blameless, pure stereotype, with whom all can identify."²³⁹ The use of victim impact statements in criminal sentencing in the USA is a sign of the victim support movement mentioned. This movement led to the enactment of a victims' bill of rights in Oklahoma in 1981 and California in 1982, the result being a harsher reaction against criminals.

The presence of victims or their family members and the expression of their vindictive emotions in court could give rise to the harshest possible punishment. If the civilizing process reduced the intensity of punishment through sympathy for others, in particular sympathy to the offenders, the victims' movement has brought about sympathy for individual victims, and harsher penal practice. If, previously, inflicting pain and suffering on criminals was intolerable, nowadays it is "the grief-stricken plea of the mother of a murdered child (that) carries a potent affective charge."²⁴⁰ In these conditions, punishment has not only renounced sympathy for offenders, but the penalty itself can be considered as a satisfactory solution for the victims, and for society.

Moreover, the crucial role of the victim in American penal discourse has played a dramatic political and social role in the ideology of the 'war on crime' and provoked more communal sentiments against offenders. It was believed that the protection of social interests, including victim's rights, is a state function. Thus "the essential division in the crime war model is not between offenders and victims, but between the state and

²³⁹ Friedman 1993, p. 308

²⁴⁰ Valier and Lippens 2004, p. 319

everyone else."²⁴¹ In victimless crimes, like drug-possession, this role is more obvious; there is no personal victim except the state. Indeed, in such circumstances the state is considered as "victim."²⁴² In other words, the actual and potential victim is society itself. The victim became a symbol of an injured society, and the state acts on behalf of society.

The backlash of the last three decades, which shows the return of traditional values - order, family and authority -changed the face of the United States penal policy. "These themes were most clearly articulated by the American religious right, which developed as a political force from the mid-1970s onwards."²⁴³ The return of retribution to American penal practice in this period "is closely associated both with populist justice and with deep-seated Christian sentiment."²⁴⁴ In the modern American penal culture, offenders are considered as dangerous and evil. In contrast to continental countries there is a kind of returned to "quasi-Christian attitude."²⁴⁵

A new wave of alarm, which has been raised by proponents of liberal principles in the treatment of children, is a reaction to the developed use of corporal punishment by parents and teachers across American society: as now "a majority of the U.S. parents use physical punishment."²⁴⁶ Further investigation showed a link between conservative protestant affiliations and physical punishment. This new trend is an implications of the

²⁴¹ Dubber 2003, p. 50

²⁴² Dirk Dubber Markus 2001, p. 956

²⁴³ Garland 2001, p. 99

²⁴⁴ Whitman 2003, p. 194

²⁴⁵ Ibid., p. 201

²⁴⁶ Ellison and Sherkat 1993, p. 131

“doctrine of biblical literalism,”²⁴⁷ in which there is a belief in the weakness and sinfulness of human nature and more emphasis on sin and punishment: “the wages of sin are death.”²⁴⁸ The result of these components of religious belief is a tougher approach to criminal behaviour. The effects of these crucial points of conservative Protestantism have gone beyond the use of corporal punishment by teachers and parents, to the area of penal practice more generally. According to this conservative interpretation of Christianity, “our (American) tendency is toward selfishness and stubbornness and sin. We are all, in effect, “strong-willed children” as we stand before God.”²⁴⁹ Such traditional religious and sacred beliefs lead to a passionate hatred of criminals and therefore to harsh punishment.

More generally punishment in the United States has been driven “much more by ideology (and) emotion... than by rational analysis of options and reasoned discussion.”²⁵⁰ As a result, American penal practice has been described by George Herbert Mead as a war on “common enemies”²⁵¹ and the punitive emotions unleashed by crime like the “emotions of battle.”²⁵²

There are two points in this that seems worthy of note. First the relationship between Christianity and penal policy is complex – as “Christianity is compatible with a variety of views, even about capital punishment.”²⁵³ Various interpretations of core

²⁴⁷ Ibid

²⁴⁸ Ibid., p. 133

²⁴⁹ Ibid., p. 133

²⁵⁰ Tonry 2001, p. 179

²⁵¹ Ibid., p. 586

²⁵² Mead. 1918 pp. 598-99

²⁵³ Murphy 2003a, p. 275

elements of Christianity like love of others and forgiveness may lead to the defence or condemnation of capital punishment. Second, the above analysis does not necessarily mean that Christianity has had the most significant contribution to the severity of punishment. On the contrary, the role of religious ideas in less severe punishment,²⁵⁴ for example the development of the penitentiary system is undeniable. In America, the movement that shaped the reform of punishment and the penitentiary was been essentially religious. However, the question addressed in this part of my study was that of how the ideology of Christianity, and sensibilities that it brought about, contributed to the formation of harsh punishment in contemporary America.

However, it should be mentioned that the modern form of harsh justice is different from that of primitive societies. Indeed, there is little similarity between traditional forms of physical punishment and torture and modern forms of penal practice in American penal policy. There is no place for "truly savage, draconian measures."²⁵⁵ Toughness of punishment should be seen in terms of the separation of offenders from society, deprivation of liberty, more supervision, surveillance, incapacitation, shame, and degradation. But still more severe punishment means more suffering. In a civilized society freedom is a key element - thus deprivation of liberty is a harmful and symbolic form of punishment. Indeed psychological suffering in modern penal practice has replaced the physical suffering central to pre modern system of criminal justice.

²⁵⁴ Savelsberg 2004, pp. 397-8

²⁵⁵ Ibid., p. 464

VIII Conclusion

The main theme of the argument in this chapter was an analysis of the increased severity of punishment in America over the last thirty years. The present study tried to show how and why, in the USA, moral and victimless crimes were increasingly recognized, minors persecuted as adults, disorderly conduct considered as a felony, and defences like insanity abolished. Punishment was harshly enforced and mercy and parole cases were significantly abolished.

I have endeavoured show how extra-legal conditions could explain why and how penal practice has transformed so toward more punitive approach. High rates of crime, alone, cannot fully account for harsh punishment. We saw the rejection of individualization and rehabilitation, continuation of traditional, moral and populist penal policies, the strict regime of prison in the USA, denying prisoners' access to higher education in some states, the performance of capital punishment, and an expiatory character of prison that could hardly be justified according to the Foucauldian theory of punishment. The weakening of scientific and specialised methods of dealing with criminals, corresponding with movements toward truth in sentencing and more fixed punishments, do not support a technical and correctionalist approach in American criminal justice. The disciplinary policy of standardization and normalization of criminals is substituted by long-term warehousing of a population with little importance to the economy. The shame and stigma attached to criminals and prisoners have made punishment more an instrument of social expression than a disciplinary and productive

institution or, as Foucault would have it, an institution of disciplinary docility utility, without physical force.

Closer attention showed that fluctuation in penal sanctions is related to changes in social context. Political considerations play an important role in this regard. Alterations in social structure in the USA, therefore, are reflected in penal practice. Public opinion became a determining factor in policy-making. Political actors and institutions were affected by and influenced public opinion. Executive agencies, members of congress and even the judicial system directly or indirectly became dependent upon public demands.

But the attribution of harsh justice to cultural factors such as mentalities, sensibilities and public opinion is too general and vague, because these explanations still do not make clear why a society is looking for severe penal practice. This study argues that all previous cultural explanations have missed out something very crucial. Harsh justice in the USA cannot be full explained without addressing notion of the sacred and religion. As a result of some disintegration in America's community, society has resorted to religion as a common and sacred base of social solidarity. As the above argument showed, a movement toward traditional values of order, family, social authority and in particular religion swept American society. "Some distinctively fierce American Christian beliefs"²⁵⁶ and sentiments developed as a political force from the mid 1970s onwards. The more sacred a society is the more severe a reaction against the violation sacred social values is expected.

²⁵⁶ Whitman 2003, p. 6

As a result of religious ideas, crime became once again mixed with sin and criminals treated as evil. Correctionalist ideas were put aside and incapacitative policies appeared. Sympathy for offenders was replaced by sympathy for victims and a kind of antagonism toward criminals emerged. Degrading, humiliation and shame attached to punishment again. Offenders were no longer social ills but social enemies that should be eliminated or separated from society.

Chapter V: Harsh Punishment in Iran

Introduction

Severity of punishment in Iran

Iran's pre- revolution criminal justice system was highly influenced by Western criminologists of the nineteenth and twentieth century. A belief in individualization and rehabilitation (largely) expressed the overarching ideology of the criminal justice system. Rehabilitative measures were accepted as penal policy, and judges had wide discretionary powers. Although judges had to sentence based on law enacted by parliament, mental disorders, psychological and physical illness, social factors like deprivation and unemployment, psychological and environmental issues had to be taken seriously in criminal procedure, and criminals could receive different treatments for the same crime.¹ According to the probation laws of 1961 different criminals could receive particular probation orders.², based on their degree of dangerousness and the category in which they are placed (mentally ill, habitual, addicted and so on) Juvenile delinquents were treated under different criminal procedures from adults and accorded various liberal regimes of treatment. The most common sentences were parental supervision or other forms of institutional supervisions.³ Juvenile courts were separate from public courts and followed different procedures.

¹ Ghorbany 1971 cited from Collection of Penal Code, 1989

² Article: 3 Probation Law, 1961

³ Public Penal Code 1974, Article 33-36 <http://www.ghavanin.com/index.asp>

As is frequently noted, the Iranian legal system, in particular the Iranian criminal justice system, had obviously tried to follow Western model of criminal justice. "The legal and the court systems (went) along European models and with the adaptation of European civil and penal codes...criminal codes (of Iran) were based on French law."⁴ The Iranian criminal justice system was substantially inspired by the French penal code of 1810 and its further amendments.⁵ Indeed it could be seen as a translation of French penal code.⁶ For example, conditions of aggravation, mitigation, suspension of punishment, and other general conditions of proof and punishment were borrowed from the French Penal Code.

This does not mean that penal practice of pre-revolution Iran was wholly westernized. On the contrary, there were cases of severe punishments like the death penalty carried out for crimes such as murder⁷ highway robbery,⁸ and armed rebellion.⁹ But generally it can be said that criminal justice system was moving toward a less severe penal practice. Policy-makers, out of professed devotion to Islamic law, had enacted a penal code that provided that, if conditions for the application of Islamic rules in crimes such as adultery, incest, robbery, homosexuality and so on were met, criminals should be punished accordingly.¹⁰ But these rules were never taken seriously. It was taken for

⁴ Sami 2003, p. 189

⁵ Facz 1991, p. 33

⁶ Mohseni 1997, pp. 41-42

⁷ Public Penal Code 1926, Article 170

⁸ Ibid., 1932 Article 1

⁹ Ibid., 1932 Article 60

¹⁰ Ibid., Articles 207 and 222.

granted that Islamic punishment was not applicable in modern times. For example, according to the previous Penal Code, appliance of these penalties required employment of jurists (*Mujtahids*) from religious seminaries (*Houzeh*), but that process never happened. Instead the Penal Code provided, for the crimes mentioned above, a relatively less severe punishment¹¹

However, in the post-revolution penal system a completely different image of criminal justice has emerged. Revolutionary courts (created by Council of Revolution)¹² and Special Courts were established a few months after the revolution. *Extraordinary and Accelerated Courts of Anti-Revolution Crimes* were constituted five months after the revolution (1980) to prosecute criminals quickly, outwith normal criminal procedures, and to carry out harsh for crimes against the revolution.¹³ Officials of the previous regime who had taken part in the massacre and the torture of people at the time of revolution time were punished, and other actions were punished severely.¹⁴ These courts, administered by three judges, were managed by a *Mujtahid* as a key court member and owner of the right of veto in sentencing. The prosecution and process of punishment to

¹¹ Ibid., Article 212 .It should be mentioned that articles like this are outcome of constitutional revolution in 1905 in which religious leaders had played crucial role. They can be considered as a symbol of Islamic culture of Iran. Historical competition between western supporter intellectuals and clergymen during and after constitutional revolution gradually led to victory of intellectuals due to lack of interest in political involvement among the religious leaders on that time. Accordingly there was no inclination in application of Islamic penal practice

¹² Official Newspaper 1980, N0.10039

¹³ Ibid., 1980-No.10018

¹⁴ Conspiracy against government, murder, espionage, treason, armed theft, rape, drug traffic, looting of public treasury, and other important economic crimes.

take place summarily. For example, according to the regulations, after accusation and prosecution, the accused had only fifteen hours time to prepare a defence.¹⁵

Amnesty International has recorded the names of many thousands of detainees who have been executed in Iran since the proclamation of the Islamic Republic in 1979. Between July 1988 and January 1989 alone Amnesty International recorded more than 2,500 political prisoners who were executed.¹⁶ The real total was believed to be much higher.¹⁷ In 1989 Amnesty International recorded over 1500 executions announced for criminal offences, more than 1000 of which were for drug-trafficking offences.¹⁸ The use of public flogging in Iran was described by Amnesty International as "cruel, inhuman or degrading," and they urged the Iranian authorities to end all such punishments, whether carried out in public or in private.¹⁹ Amnesty International recognized Iran as second only to China in terms of the number of executions.²⁰

Criminals were faced with the death penalty, life imprisonment and confiscation of property in many cases. According to the Regulation of Revolution Courts and

¹⁵ Revolutionary Courts Regulations 1980 Article, 8. Official Newspaper. Ibid A Mujtahid or Faghih is an Islamic scholar (traditionally a clergyman) who has knowledge of Islamic rules (*Shari'at*) and authority of their interpretation in various circumstances

¹⁶ Iranian officials never regarded them as political prisoners. They were members of armed rebellious groups that had officially involved in a armed fight against Islamic government. They are considered by EU and the USA, as a terrorist group. "The European Union's blacklisting of Iran's main opposition group, the People's Mojahedin Organisation of Iran (PMOI), was the greatest gift to the mullahs ruling Iran' See; <http://www.iranfocus.com/modules/news/article.php?storyid=1746> Moreover, these reports are not regarded by the Iranian authorities as accurate. They assumed these kinds reports as part of international tyrannies' project against the Islamic Revolution.

¹⁷ Amnesty International. 13/15/92 See;

<http://www.amnestyusa.org/countries/iran/document.do?id=7D4EA7D35E816F03802569A600602B9A>

¹⁸ Ibid

¹⁹ Amnesty International 13 august 2001 See;

<http://www.amnestyusa.org/countries/iran/document.do?id=147196251E821414B80256AA400469CA4>

²⁰ See; http://www.bbc.co.uk/pcrsian/news/story/2005/04/050405_si-deathpenalty-record.shtml 05/04/2005

Revolution Public Prosecutor's Office, there was a list of crimes such as treason, crimes against the Islamic government, rape, drug trafficking, armed robbery, serious economic crimes and so on,²¹ and a list of punishments including the death penalty, imprisonment, exile and confiscation of property that had been acquired illegally.²² There was no pre-determined punishment for any particular crime. The principle of legally determined punishment was not observed. *Mujtahid*²³ (*Hakem- e- Shar'e*) sentenced based on *Feqh*²⁴ rules. There were summary trials and there was no right of appeal for the convicted.

The Council of Revolution or supreme leader selected the *Mujtahid* members of these courts. The Revolutionary Court's regulations recommended that punishment should preferably be performed in the place where the crime was committed. Other crimes could be prosecuted based on the Penal Code legislated in 1926 and amended in 1974. It should be mentioned that these revolutionary courts still exist and are very active with approximately the same jurisdiction, but they are better organized, since they became part of the judicial system and now follow the same substantive and procedural law. For example, there are 35 active branches of the Revolutionary Courts in Tehran. Since they prosecute serious crimes, deliver harsh punishments and have kept their

²¹ Regulation of Revolutionary Courts, Approved by Revolution Concile 1980, Article 2 Op. cit

See also, Summary Trial Bill against Anti-Revolution Crimes-1980- Official Newspaper, No.10018

²² Ibid., Article 12

²³ Although sentences should issued by majority of three judges, but jurist members had right of veto, because it was him that was considered as representative of the *Shari'at*. Ibid Articl.11

²⁴ In Shi'at branch terms *Feqh* is counterpart of *Shari'at* in sunni branch

previous judges, they preserve some of the previous rules. Their trials are unpublicised, and their names are associated with a kind of horror.

In addition to Revolutionary Courts, there are two special courts that operate differently from public courts: Military Courts and Special Courts of Clergymen. The former were "established by law to investigate crimes committed in connection with military or security duties by members of the Army, the police forces, the Islamic Revolution Guards Corps and other military and quasi-military groups."²⁵ These special crimes are considered extremely treacherous and treated harshly. These kinds of criminals are prosecuted secretly and punished more harshly than other criminals in similar circumstances. Prosecution of criminals in the Special Courts of Clergymen are even stricter²⁶. This is particularly because it is neither constituted nor operated according to certain law, but operates under the supervision of the Supreme Leader. Procedurally and substantively it is a striking example of the system of *Kadi-justice*. Crimes are not defined and punishments are not determined by penal codes. They are totally managed by the clergy and do not allow lawyers to defend their clients unless they are clergymen. It is said that the aim of these courts is the preservation of the clergymen's sacredness and social standing. It is believed that wrongdoing, anti-social behaviour, or behaviour that is not compatible with their religious and social position, damages

²⁵ Constitution Law 1990, Article, 172

²⁶ The Special Court for the Clergy (*Dadgah-e vizhe-ye Rouhaniyat*) was established based on a letter written by the Grand Ayatollah Khomeini dated 25 Khordad 1366 (15 June 1987)(8) in which he appointed Ali Razini as Judge (*Hakem-e Shar'*) and Hojjatoleslam Ali Fallahian as the Prosecutor for the Special Court for the Clergy. The functions and scope of the new court were described by Hojjatoleslam Fallahian in a press interview published in several newspapers on 7 July 1987. He stated that the court would "investigate crimes such as counter-revolution, corruption, fornication, unlawful acts, accusations which are incompatible with the status of the clergy, and all crimes committed by 'pseudo-clergy', both in terms of the ugly acts they commit and the effect they have on the reputation of the clergy". The courts were to be set up in Tehran, Mashhad, Tabriz and Shiraz, and later in other cities as necessary. Amnesty International.

reputation and authority of the clergy as a whole, and also damages Islam. For this reason, one of the famous penalties for these (political or non-political) criminals is their dethronement. These courts prosecute all criminal and immoral behaviour of clergymen and all cases that in some way involve them whether as criminal or victim. The secret procedures of these courts, the unpredictability of their sentences, and their strict approach to extinct crime have also associated their name with horror and anxiety.

An important stage in the substantial transformations of penal practice in Iran was the legislation of the Islamic Penal Code in 1983.²⁷ This penal code was finally approved in 1997 by a parliamentary amendment. With this, the content of punishment changed profoundly, becoming substantially more severe than before. One element in this increased severity was increased criminalization.²⁸ Moral and victimless crimes increased sharply in numbers. Rape, homosexuality (for both men and women),²⁹ incest,³⁰

²⁷ In the Islamic Penal Code article 12-17 - that is based on *Feqh* books in particular Ayatollah Khomeini's book by the name *Tahrirul-Vasileh* (1970) - punishments are classified in five categories:

1-*Hododd* (singular form is *had*) is a punishment that its type, amount and quality are determined by *Feqh*. These kinds of penalties are mostly determined by *Quran* and rarely by Infallible Imams.

2-*Chesas* (retaliation) is a punishment that should be equal to crime. This punishment performs against all injuries done against human body, including crimes against individuals including homicide.

3-*De'ye* (blood money)

4-*Ta'zir* is a penalty that its degree and type is not specified by the *Feqh*. Ruler (government) is Authorized to define crime and determine punishment in this area. *Ta'zir* can be fines, imprisonment and whipping that number of flogging must be less than number of flogging in *Had* (The least *Had* is 74 lashes). Judge have more discretionary power in sentencing and even describing and act as a crime.

5-Preventive (Deterrence) is a punishment that determined by the government (parliament) in order to maintain the public interests and public order. It can be in the form of fine, imprisonment and other community punishments. Two points should be noted here, first the main distinguishing feature between *Ta'zir* and preventive punishment is that, *Ta'zir* is imposed for an act that is religiously illicit, but *Shari'ah* did not determine specific punishment. While in the preventive case there is not any religious background. An act is crime because it is harmful for society or individuals.

Second, there is not necessarily relationship between preventive punishment discussed here and deterrent punishment known in western countries. They are not necessarily severe rather are less severe than other types of punishment mentioned above like *hodod* and *gessas*.

²⁸ Jahangir Mansor 1997, Islamic Penal Code Article No.63

²⁹ *Ibid.*, Articles. 108-127 82

³⁰ *Ibid.*, Article. 168

adultery, drinking intoxicating liquor, panderism³¹ and apostasy were defined as serious crimes to be punished severely, including by the death penalty and flogging. The “number of crimes rose to 2000 (at least twice the previous number). Four hundred of these crimes potentially are subject to imprisonment,”³² and the rest to fines, the death penalty, confiscation, public flogging, cutting, stoning and so on. The overall number of accused who have been sent to prison as detainees or as convicts rose to “600, 000 in a year,”³³ and the number of prisoners rose more than ten times in comparison to 1979.³⁴ It should be added that in a considerable number of cases flogging, execution and other traditional punishments replaced prison. This means that the true figures for punishment are far greater than the numbers of those sent to prison.

Purely religious crimes like apostasy received unforgiving penaltics. Insulting sacred figures like Prophet Mohammad or other great prophets like Jesus, carried the sentence of death.³⁵ Committing crime in sacred months like Ramadan, and sacred places like the Mosque, led to more intensive punishment than other times and places.³⁶ Likewise other behaviours that are religiously prohibited are considered as crimes, if they happened publicly, such as eating or drinking in public during the month of Ramadan.³⁷

³¹ A sexual procurer as a job.

³² Bakhteyari Head of Razavy Khorasan Province Judiciary 04-02- 2005 ISNA

³³ Ibid.

³⁴ Ysagi Aliakbar Head of the Institution of Prisons in Iran, 25-02-06 BBC News Persian See; http://www.bbc.co.uk/persian/iran/story/2006/02/060225_mf_prisoners.shtml

³⁵ Islamic Penal code. Article 513

³⁶ Ibid., Article 106

³⁷ Ibid., Article 638

As mentioned above, the Iranian government took a harsh approach toward crimes against government, security and public order. The harshest forms of penalties were used against even ordinary members of rebellious groups that follow a strategy of fighting against Islamic government in order to bring about its fall, even if they have not taken part in military activities.³⁸ Further, the punishment of these types of criminals did not finish after with death. They were not allowed to be buried in ordinary cemeteries, or to have a conventional ceremony and mourning, because these kinds of ceremonies belong only to respected people.

Public punishments like public flogging and public execution entered the list of penalties. Under the Islamic Penal Code (IPC), stoning to death, for example, is a penal practice that only can be delivered by the public.³⁹ In particular, judges considered flogging as the most popular and influential sentence against moral crimes. Flogging is the most commonly used punishment, either independently or in addition to other punishments, against religious or non-religious crimes. In the first years of the revolution, whipping was mostly carried out in public places. "Public Floggings of accused for drinking alcohol or making sexual advances is still carried out sporadically."⁴⁰

The symbolic principle of retaliation is fully reflected in the IPC. The Iranian criminal justice system provided for retaliation for all types of crimes against the human

³⁸ Ibid., Articles 185-8

³⁹ Article, 101 provided that the time of performance of *had* will be announced by the judge and presence of group of faithful that must not be less than three, is necessary.

⁴⁰ BBC World News, 15 August 2001, a report by the name. Row over Public Floggings in Iran.

body including homicide, injuries and beatings.⁴¹ The conditions of retaliation are so difficult that, in practice, it can be performed only in homicide cases. Punishment should be exactly equal to the injury that has been done by the accused, and criminals must not suffer more pain than they caused.⁴² Retaliation in murder cases is fixed so that judges may not issue the other sentences.⁴³ It is very important to know that the right of retaliation in all cases of injury and beating belongs to the victim. If the victim or his (or her) family wants, a murderer will be killed; if not, he will be free after around three years of prison. The victim's family can carry out the death sentence.

Moreover, there is a controversial and problematic system of *privatization of punishment or permission for killing* in particular circumstances.⁴⁴ Although the state is primarily in charge of the penal reaction to any violation of social values, in certain conditions members of society are allowed to defend their sacred social values, and carry out the penalty in the absence of the state as a representative of society.

In addition, the reduction in the age of criminal responsibility and the abolition of time limits on criminal prosecution and performance of punishment, show an absolute zero tolerance policy in the "*Fight Against Smuggling Law*", which regards social security as one of the most vital social values and imposes the death penalty for merely

⁴¹ IPC. Articles, 204-293

⁴² Ibid. Articles, 272-293v

⁴³ Bazgir 1998, p.39

⁴⁴ For example according to IPC, if a killer honestly believed that his victim deserved to be killed he cannot be assumed as murderer. This kind of penal policy gave rise to theoretical and practical problems in Iranian society. This issue will be discussed below in more detail

“resorting to arms in order to frighten People.”⁴⁵ This law determines severe fixed punishments and reduces the discretionary power of judges in a considerable number of cases. This shows how profoundly penal practice transformed in Iran’s post-revolutionary penal practice.

Up to now I have tried to draw a general picture of penal practice after the Islamic Revolution in Iran. I shall now go on to explain how this penal revolution occurred, in order to trace the kind of social, political and cultural contexts that brought about this deep transformation in the criminal justice system. The subject matter of this chapter is an investigation of the relationship between religion and other social forces and the harsh penal reactions that have been imposed on against criminals.

I shall first attempt to explain why such profound changes occurred in Iran’s revolutionary criminal justice system. The Islamic revolution of 1979 so transformed criminal justice system that it is no exaggeration to say that penal revolution followed political revolution. But why penal practice become so harsh after the Islamic Revolution? For onlookers, it is clear that there has been a movement toward traditional and religious punishment. As we will see, there is a close relationship between transformations in penal practice and the idea of religion. But it is still necessary to explain why religion was suddenly placed in such a crucial position in the determination of penal practice.

⁴⁵ Islamic Penal Code, Ibid, Article 183

As I have argued in previous chapters, from a Durkheimian perspective, social punitive reactions have a kind of cultural resonance. They can be considered as an expression of society's common beliefs and sentiments. The stronger and more sacred are these morals, the more severe the reaction when they are violated. Penal policies, and the transformations that they undergo, can therefore be better understood in light of socio-cultural transformations, with correlations between variations in severity and type of punishment, and changes in the content of culture. Deep, rapid and profound social change has a considerable reflection in penal practice, because society is the crucial source of social institutions including punishment. An obvious fluctuation in rigidity or flexibility of a certain society's moral standards can be correlated with a fluctuation in the severity of penal practice. Accordingly, an investigation of political and cultural transformations could account for the appearance of new forms of punishment in post revolution Iran.

I Politico-cultural contexts

While punishment is a symbolic and expressive response of collective consciousness, it is not clear why that response is so harsh. For Durkheim, the severity of the punitive reaction depends on the strength of collective feelings and public conscience. For him, when collective consciousness is religious in character, the social reaction will be brutal. Blame is no longer the same as in non-religious society in which an act is criminal because it offends individuals, society or civil religion. "The offence of man against man cannot arouse the same resentment of offence of man against God."⁴⁶ This can be relevant to understanding the changes in Iranian criminal justice.

I will investigate how religion in the Iranian society encompassed and contained on intermingled set of beliefs and practices regulating ethics, principles of political organization and penal policy. As Foucault observed, the event of the Islamic Revolution was the resurrection of Islam as a political religion. Religion became a symbol of social ambitions uniting all oppositional and revolutionary activities. As we will see below in more detail, Islam became a badge of society and eventually led to the establishment of an Islamic government and penal practice. But, why did Iranian society, as a developing country and the most westernized society in the Middle East in the second half of the twentieth century, recognized as *modern Iran*,⁴⁷ return so rapidly to its historical and traditional background? A shift of back towards traditional values and religion swept Iranian society. My claim is that the lack of synchronization between westernization and

⁴⁶ Lukes and Scull 1983, p. 125

⁴⁷ Bonine and Kiddie, 1981

existing moral principles was the most influential factor in the changes that culminated in the 1979 Revolution.

The Shah's government, and his supporters in Iran and western countries, carelessly pursued process of westernization in all industrial, cultural, religious arenas – though, importantly not political⁴⁸ without attending to the anxieties of Iranian society. The uneven and sudden presence of modern industries, culture, and civilization in Iran appeared as manifestations of corruption and immorality and eventually gave rise to a huge disturbances, social explosion and finally revolution. Western values such as freedom of alcohol drinking, of relationship between men and women, in particular *Bi'hijabi* (lack of veil) as the most obvious symbols of modern culture, appeared as symbols of corruption and immorality, compromising the values that underpinned the structure of families and society. Yet, the Shah's regime tried forcefully to modernize all aspects of Iranian social life. He attempted to dominate religious establishments through modern, scientific, judicial and educational institutions, and as a consequence the Shah's regime was regarded as an enemy of society, religion and as a great criminal that should be punished harshly. Collective consciousness directly avenged the Shah's regime through its religious rituals, and its united reaction in the greatest revolution of the twentieth century.

⁴⁸ Following development of Revolution in 1979 and few months before Victory of Revolution, Shah followed American president (Jimmy Carter) in providing an open political atmosphere, but it was too late. It was considered as a sign of his defeat that in addition to freedom of political prisoners as leaders of revolution multiplied and accelerated revolution sentiments and speed up victory of the revolution.

My claim here is that Iranian society used religion, religious rituals, and religious symbols as a shield against the threat to their national identity and social solidarity. An endangered moral being, society, stimulated energy and dynamism through religious ceremonies. The Islamic Revolution showed that charisma, and in particular religious charisma, is not only of historical relevance and can still play an effective role in modern society. Thus, Iranian society resorted to religion and sacred symbols; in Foucault's terms it became a perfectly united collective will, collectively sacrificed and geared toward a desired end. Now this priceless consequence, sacred social solidarity, had to be preserved. The political system became a representative of society, charged with the protection of social values. As we will see, the political system, having experienced the force of religion, tried to transmit this sacredness to other political, social and moral values and consequently justify harsh penal practice. Religion became the foundation for social solidarity, and thus every offence against social and political values received a passionate reaction.

Foucault aptly reported that Khomeini was not a politician, but an almost mystical personality, who was able to guide the demonstrators and maintain their energy. He rightly reported the readiness of millions of people for sacrifice, arguing that "the image [of the unarmed saint versus the king in arms] has its own captivating force."⁴⁹ He said, "Islam has given its people indefinite resources for resisting."⁵⁰ But, as we will see, he

⁴⁹ Leezenberg 2004, p. 102

⁵⁰ Ibid., p. 106

mistakenly used these self-sacrificing behaviours as the ultimate motivation for introducing "a spiritual dimension into political life."⁵¹

It is true that Imam Khomeini, as Foucault noted, was not a conventional politician, but this same characteristic was also the cause of his achievements. He was symbol of religion as base of social solidarity. His mysterious personality was the symbol of the mystery of religion. In Durkheim terms, he was the '*emblem*' and '*totem*' of society. In short, Iran appealed to religious totems, rituals and other sacred symbols in order to revive and secure social solidarity against immoralities, corruptions and social threats. I do not agree with Foucault that Khomeini was not a politician and had no political ambition.⁵² Khomeini frequently insisted on the *unity of word and word of unity, the word of the Islam* (not shi'at sect because a considerable portion of the Iranian people are Sunnite) as an essential condition of victory and prosperity. He successfully manipulated religious sentiments and rites "against shah's regime, the American presence as enemy of Iran" and against alleged 'Zionist conspiracies' to undermine the nation."⁵³ He continued to use religion as a banner for a decade after the triumph of the revolution in constructing a political system.

As we will see, the theatrical spectacle of punishment and reproduction of crime's sense in the execution of the condemned man, and the process of reviving and annulling the crime before the public, can be analyzed from both Durkheimian and Foucauldian

⁵¹ Ibid

⁵² He was apparently unaware of Khomeini's book of Velayat-e-Faqih (guardianship of the jurist, that is, ruling by the Shi'at clergy) that was written a decade before the revolution.

⁵³ Ibid., p. 101

perspectives. Publicly displaying the criminal with a placard on their back, accompanied by police forces, the declaration of their sentence at the foot of the scaffold, the confession of the criminal in front of the public through the mass media, performance of the execution and exhibition of their corpse at the scene of their crime can be explained in terms of the political process, the presence of the sovereign power, and the active force of power's revenge. Or it can be justified in terms of moral expression and social revenge, as Durkheim contended.

As the following arguments show, one should not ignore the fact that guilty people in some cases are considered as rebellious and hostile, which calls for revenge. But the content of sentences, lectures and the cries of people in front of the scaffold, the performance of harsh punishment against even minor moral and religious crimes, the determination of punishment according to the religious legal rules and so on, all have at the first stage a moral and religious message. Any violation of sacred moral and religious standards – as the foundation of social unity - cannot be tolerated. The following argument tries to show how the political and judicial system mobilized, promulgating conceptions like enemy, conspiracy, sacred and the like in order to strengthen social solidarity, the political system and perform harsh punishment.

I-1 Politics, institutions and penal policies

The proximity of political and social institutions to religious conceptions and institutions gives them a colour of religiosity and sacredness, and every offence against

them, or the rules that they pronounce, can be seen as a sign of impurity and wickedness. In such an environment, in which real and imaginary political or social enemies are ready to invade sacred common principles, every criminal can be judged as evil and a soldier of the enemy. Historical attitudes towards conspiracy in Iran, the social realities of potential and actual enemies in a revolutionary society, and a victory that had been achieved at the cost of thousands of sacred martyrdoms brought about remarkable passions against all who could be regarded as opponents of a revolutionary and sacred society.

After the Islamic Revolution in 1979, penal practice became politically significant because, first, eradication of corruption in the performance of justice had been a historical and political ambition for centuries, in particular from 1905 onwards.⁵⁴ Secondly, the establishment of the Islamic government had been justified partly because of the idea that Islamic rules, like Islamic punishments, as divine decrees, could not be performed without an Islamic state.⁵⁵ In other words, from a philosophical point of view, performance of divine rules in society (including religious punishments as leading part of these rules), at least partly justified the establishment of the Islamic state.

Third, “the Ulama reacted against moral corruption in the Shah’s regime like clergymen anywhere in the world: they argued that moral laxity had produced the social problem, and that the only way to solve the problem was strictly to enforce the religious

⁵⁴ Shi’i people love *Imam Ali*. They believed that he had been the most just man in the world and it is frequently said; He martyred because of his extreme justice. Revolution of 1905 begun with demand of “House of justice”

law.”⁵⁶ They believed that ethical principles are the most essential foundations of social integrity. Therefore, social, economical and moral corruption was both a religious and political humiliation for Islamic society and a sign of inefficiency for the Islamic government. Since an Islamic society has historically been a utopia for Muslim people, religious revolutionary leaders claimed that in Islamic society corruption and immorality would be eradicated. In a society of believers and saints, crime and sin could not be tolerated. It was time to prove this theoretical orientation.

Fourth, conspiracy played a crucial role in giving penal practice a highly politicised role. It was, and still is, accepted as an unquestionable reality that Islamic society has very sophisticated, well - equipped, well-organized, and strong enemies. According to the prevailing political ideology, these enemies are continuously planning for war against Islamic society. Some historical and political events, like the *coup d'etat* against the democratic government of Dr Mossaddegh by the USA, Saddam Hussein's invasion of Iran in 1981 (supported by superpowers⁵⁷ and some western countries), simultaneous civil wars, armed rebellions across the country, and increasing drug offences firmly strengthened the conspiracy theory. This belief has constituted the dominant discourse in Iran for more than two decades, and remains strong amongst Iranian officials, in particular conservatives.⁵⁸

⁵⁶ Ervand 1982, p. 474

⁵⁷ Hiro 1987, p. 4

⁵⁸ Hashemi Sahrodi Head of Iranian Judiciary 27-01-2005 .ISNA

Fifth, thousands of people, in particular the youth, had been martyred or tortured by the shah's regime during the revolution, in particular in the years 1978-79. Thus, feeling of revenge on the one hand, and the performance of divine decrees against the previous regime on the other, gave rise to the establishment of revolutionary courts in 1980. Revolution (regarded as a continuous phenomenon) and revolutionary courts continue to act against all anti-revolutionary, organized and serious crimes, rebellion, crimes against the government, drug dealing, and so on. Eight years of the Iraq-Iran war (1981-1989), in which the masses were largely involved and sacrificed, extraordinarily developed the sacredness of social and political values, and strengthened the Iranian sense of social integrity produced during the revolution.

In this part of my study I am not going to deal with all economic, political or even religious factors as a background to the Revolution. Although issues like economic growth following the great rise of oil prices, economic corruption, hyper-inflation, unemployment, and the large gap between propertied classes and poor people in Shah's period are important factors in Iran's revolution, the present study seeks to investigate the more powerful historical and social forces that led to the unprecedented political and penal revolution. Although a full study of the Islamic revolution of Iran is not my aim, an understanding of the eruption of the Islamic Revolution requires knowledge of the historical, emotional and religious forces lying like molten rock deep under the surface of society. Without a brief discussion of these religious symbols, emotional rituals, and charismatic characters, the study of transformations in the Iranian society, Islamic

Revolution and the new wave of harsh justice in the Iranian criminal justice would be incomplete.

I-2 Islamic Revolution in Iran 1978-1979

"A revolutionary movement sprang up in Iran at a time of economic prosperity, military strength and political stability."⁵⁹ American president Jimmy Carter, a few months before the victory of revolution, had called Iran, "an island of stability in one of the most troubled areas of the world."⁶⁰ Half a million military personnel, known as the fifth army of world, sophisticated intelligence services, and political support from western countries (in particular America) failed to defeat a seventy-five-year old exiled cleric. For some political analysts, "it seemed to be more a divine miracle than a human endeavour."⁶¹ This miracle continued for some years after the victory of the revolution and "offered the world a series of surprises."⁶²

Although political considerations are not the leading thread of this investigation the interaction between political and sociological changes and penal policy transformations necessitates the study of the social and historical contexts that facilitated their transformation. In order to better analyse the background of the 1979 Revolution, I will look very briefly at apparently unrelated patterns running through twelve shi' at

⁵⁹ Hiro 1985 p. 1

⁶⁰ Ibid

⁶¹ Ibid., p. 2

⁶² Ibid., p. 5

Islam that came together and contributed to the culmination and intensity of the 1979 Revolution. These will be analysed in turn.

a) Twelver shi'ism and political legitimization

Shi'at believes in twelve infallible sacred religious leaders as successors of Prophet Mohammad, called Imams. The first was Imam Ali, the son-in-law and cousin of the Prophet and the last is the Hidden Imam who went into hiding in 874 C.E. As shi'at is a "messianic"⁶³ sect, all political and religious powers were given to Imams by god. All the Imams except the *Imam Mahdi* (hidden imam) were martyred by tyrannical governments. The Hidden imam, after his disappearance, introduced four secret representatives to connect the people to him. After that, he sent a message stating that he would not introduce any more representatives, and that people should refer to the *Ulama*, for answers to their religious questions and social problems.

For shi'at everyone who held political power was, therefore, considered as a usurper and illegitimate. Shi'at believers justified themselves through the theory of "*taghiyya*", which means that you can conceal your faith and delay its assertion in order to protect yourself, and your society⁶⁴. The presence of Hidden Imam and absolute peace, justice and equality in his government is an ultimate ambition of shi'at. They always pray to the God for his appearance, on particular, in every Friday early morning, because they are promised that he someday would appear on a Friday. The anniversary of the his birthday is the biggest religious ceremonies in Shi'at. In contrast to Weber's

⁶³ Bonine and Kiddie 1981, p. 35

⁶⁴ Shi'at historically has been a minority group amongst other branches of Islam. Their Imams order them to hide their ideas in dangerous situations.

theory, in which charismatic figures and the charismatic legitimation of political system is mainly historical, the case of Hidden Imam in Shi'at shows that in a religious society like Iran this conception is fully active and functional. The Hidden Imam as a very sacred, prophetic and powerful charismatic character is still alive and Shi'at people in countries such as Iran and Iraq enthusiastically follow his decrees, and the ordains of his successors. Such as the Ayatollah Khomeini in Iran, and what we are witnessing now in the case of Ayatollah Sytany in Iraq.

b) The Pattern of Karbala

The martyrdom of the third Shi'at' Imam, Hussein, "at the hand of the Umayyad armies of the caliph, Yazid at Karbala in AD 680, is undoubtedly the most important and emotive episode in shi'at's history."⁶⁵ For shi'at, martyrdom of the Prophet Mohammad's grandson, son of Imam Ali, is simultaneously the most extreme epic and tragedy. Around 72 saints, loyal to their Imam, fought against more than thirty thousand soldiers. The aim of this sacrifice was the end of corruption and the protection of the Islam. "From early childhood, most shi'ats have been immersed in a culture in which the martyrdom to Imam Hussein plays a very important role."⁶⁶ The name of Imam Hussein for Shi'at is synonymous with sacrifice for real Islam and justice – "Poetry celebrating the heroic death of (Imam) Hussein had long existed, both in Persian and Arabic."⁶⁷ Singing and mourning for him is part of everyday life. at funerals, and other traditional ceremonies, Shi'at commemorate the name and goals of the martyred Imam. The first ten

⁶⁵ Momen Moojan, 1979, P. 8 www.northhill.demon.co.uk/relstud/shia.htm

⁶⁶ Ibid

⁶⁷ Avery et al, 1991, p. 724

days of the Muharram's month are devoted to particular ceremonies for him, culminating on the last day, the day of the martyrdom of the Imam Hussein, *Ashura*.

Almost all people take part in these massive, mythic and spiritual rituals. They sing, cry, whip themselves, exceptionally cut themselves, and march in order and so on.⁶⁸ People forget themselves and other earthly issues. They put aside material life and forget their individual impulses. They experience a different form of life that is full of passion, fervour, and enthusiasm. They do not live for themselves, but rather for their sacred values and sacred society as their aspiration. In these highly emotional and spiritual rituals they call on their Imam, his goals, bravery, his loyal followers, his family and young beloved martyred, holy values that he sacrificed himself for and so on. These ceremonies are so dramatic and effective that non-Muslim Iranian people like Christians try to respect them, take part in these rituals, and even commemorate it independently in their churches.

For shi'at, Imam Hussein represents the immense martyrdom of Islam, justice, humanity and is a symbol of the fight against tyranny, corruption and vice. He is their Jesus, who fought for virtue, equality and the principles of the Islam. For Shi'at people, "thus the Karbala episode is not an event in distant history, but rather a powerful symbol kept alive among the shi'at masses by frequent emotive rituals and ceremonies."⁶⁹

⁶⁸ This behaviour is religiously and legally allowed, but in such a huge ritual every thing is not under control.

⁶⁹ Avery et al, 1991, p. 724

c) The Role of Ulama in society

The contemporary history of Iran cannot be commented on without investigation of the active role of the Shi'at religious scholars (the *Ulama*), and their hierarchical relationship with clergymen (the *Rohaneyyat*) and other religious institutions like the *mosque*. The Ulama in the early history of shi'at were considered as the holders and transmitters of the traditions (*hadith*) of the prophet and the Imams (prophet's successors). They had endeavoured to protect the heritage of the Imams and the prophet. Over a long time, the Ulama began gradually to be conceived of as the general deputies of the Hidden Imam in applying Islamic judgments based on Islamic law, as well as some other social activities like the collection of religious taxes (*Kums and Zakat*).⁷⁰

The Ulama were long recognized as quietist. However, "by the seventeenth century [.....] we hear of leading Ulama (*Mujtahids*⁷¹) who claim they have more right to set policy than impious, wine-bibbing shahs."⁷² They gradually and sporadically engaged in political activities. It is important to note, in this context, that the Ulama in the Shi'at sect are different from their colleagues in Sunni. First, '*Ijma*', consensus, and the emulation of the accumulated *Ijma* "of past generations, limits *Ijtihad* in Sunni world,"⁷³

⁷⁰ Khums is one-fifth of annual revenue that religiously must be paid by the emulators to the Ulama whom they followed. Zakat, is one-tenth of agricultural revenue that should be paid annually by followers to the Ulama.

⁷¹ A Mujtahid is a high position religious scholar who could exercise "efforts" (*Ijtihad*) in interpreting religious law and doctrine. They do not necessarily work in other field like philosophy. 'The final cycle in shi'at's *Feqh* training (is) training in *Ijtihad*, to arrive at independent opinion on matters of law and interpretation.' See Zubaida Sami, *Law and Power in the Islamic World*, 2003, P. 184. It should be noted that, law in this field covers all religious activities including worships, transactions, punishments and other individual and social activities.

⁷² E. Bonine Michael and kiddie Nikki 1980, p. 2

⁷³ Zubaida Sami 2003. p. 184

while the dynamic of *Ijtihad* based on rational and traditional principles gives Shi'at Mujtahids more room for flexibility and autonomy. *Ijtihad* and the declaration of new *Fatwa* to suit new conditions is a regular practice of high Ulama in Shi'at, "as we saw in both the constitutional Revolution of 1906, and the more recent Iranian Revolution of 1979 and the Islamic Republic it generated."⁷⁴

Second, the Shi'at Ulama were more politically reactive to threats to their nations and countries than Sunni Ulama. This is because Sunni Ulama "had less economic independence and strength than the Iranian Ulama."⁷⁵ Shi'at Ulama are economically independent through Khums, Zakat and Waqhf (charity) institutions. Third, the Shi'at Ulama are generally deputies of a highly sacred and charismatic hidden Imam, who "will return to earth as *Mahdi* (messiah) to institute the millennium of perfect equity."⁷⁶ This feature, coupled with their simple and ascetic life, endow with them more charismatic character.⁷⁷ Fourth, the Shi'at Ulama have almost always been independent of the state. "Unlike their Ottoman counterparts, their power did not derive, for the most part, from state office or stipend, but from their position in the religious institutions"⁷⁸, and their followers among the masses.⁷⁹ Moreover, the Shi'at Ulama are equipped with a huge

⁷⁴ Ibid

⁷⁵ Bonine and Kiddie 1980, P. 25

⁷⁶ Ibid., p. 2

⁷⁷ What is shown by the Ayatollah Sistani an Iranian born Marja' [a senior *Alem* (singular form of The Ulama)] in Iraq is a example of such position of the Ulama in society. Although he is not a political activist and doesn't want to be directly engaged in politics like a politician.

⁷⁸ Zubaida Sami 2003, p. 182

⁷⁹ Religiously every Shi'at must emulate a senior *Alem* (singular form of the Ulama) who called *Marja'*, literally means reference. Typically this emulation does not cover, political matters.

hierarchical system of *Houzeh*⁸⁰ in every city and town, mosques, and Hossineyehs⁸¹ that are supervised by the junior clergymen.⁸² These structures, their independence, and their charismatic character gifted them a powerful position in society, although historically they have not always applied that power in political struggles.

A historical event may show the potential powers of the Ulama in Shi'at society. Nasiru'd-Din shah⁸³ (1848-1896) was the most powerful ruler of the Qajar dynasty, and ruled Iran for around fifty years. On 8 March 1890 the shah secretly offered a fifty-year monopoly of all activities related to Iran's tobacco "to Major G.F Talbot of the British-owned Imperial Tobacco Company."⁸⁴ The deal was very unbalanced in favour of the British company.⁸⁵ As a result, *Grand Ayatollah Shirazy*, who lived in Iraq, "issued a *Fatwa*"⁸⁶ to the effect that every kind of smoking tobacco was religiously forbidden and considered as war against the Imam Mahdi: "the nation reacted with astonishing single-mindedness; all pipes and cigarettes which were such an essential part, as essential as tea,

⁸⁰ Religious system of education. Some writers like Zubaida has used title of Madrasa instead of *Houzeh* that is not conventional and known. (see Ibid. p. 183). For example this year (2005) in Muhrram months Houzeh sent 27000 clergymen across country in order to mourning ceremonies of the Imam Hussein and introducing his messages to people(1). This amount should be added to thousands of clergymen who constantly are present in mosques.

(1) Ayatollah Meshkini Ali 04 -02-2005 ISNA

⁸¹ Local religious institutions like mosque that are established for mourning ceremony and commemoration of Imam Hussein.

⁸² In Western terms Mullah frequently uses instead of Clergyman or Rohani (spiritual), while Mullah in Iranian culture is considered as a kind of insult.

⁸³ Avery Peter 1965, p. xiii

⁸⁴ Hiro 1987, p. 17

⁸⁵ Entire tobacco crop of Iran and other activities related to that offered for a personal gift of £25000 to him, and a annual fee of £15000 plus 25 percent of profits to the state. The yearly consumption of 10000 tons of tobacco Iran indicated the magnitude of deal see Hiro Dilip Ibid p. 17

⁸⁶ Avery Peter 1965, p. 104

of any Persian gathering or recreation were abandoned, even in the royal household."⁸⁷

This was a nightmare for Shah, who for several decades had tried to put the Ulama out of political activities. Crisis engulfed the country, and there was no choice for the Shah but cancellation of the concession to the Tobacco Company.

d) Eruption of Revolution

The intensity of the Iranian Revolution of 1979 and the suddenness with which it appeared surprised many people both in Iran itself and in the rest of the world.⁸⁸ The Shah Mohammad Reza was equipped with numerous instruments of power, including "the fifth largest army of the world,"⁸⁹ a strong bureaucracy⁹⁰, and a powerful police and security forces like SAVK [that acted] as an "iron fist"⁹¹ against any political activity. All political opponents, parties, and secularist oppositions were suppressed or destroyed, and an expanded governmental party was created which provided the regime with a large governmental and party bureaucracy⁹². The Shah, the royal family and their loyalists were the richest family in Iran,⁹³ and the "quadrupling of the oil price"⁹⁴ in 1977 made them still more powerful and rich. "The Shah's regime was associated with secularist

⁸⁷ Ibid, it is very famous example that, someday, Nasiru'd-Din shah asked his wife to bring him a pipe. His wife said; do not you know that it is forbidden. Who said that, asked shah? His wife replied the man who allowed me to be your wife, Mirza Shirazi.

⁸⁸ Moojan 1979, P. 1

⁸⁹ Ervand 1982, p. 435-36

⁹⁰ In the course of fourteen years (1963-1977), the state bureaucracy grew up from 12 ministries with some 150000 civil servants to 19 ministries with over 340,000 civil servants'. (see Abrahamian, 1982 p. 438)

⁹¹ Ibid, pp. 435-39

⁹³ Ibid., pp. 437-38

⁹⁴ Ibid., p. 435

politics and with ties to the West and Israel; (likewise) Russia (Soviet Union) and China supported the shah."⁹⁵

The shah's regime had not ignored those social institutions that were considered as purely religious but had tried to marginalize or control them. The educational and judiciary system had become secular but it had also tried to dominate religious institutions. The Faculty of Theology was established in prominent cities like Tehran and Mashhad against Houzeh, *vaqhf* became a governmental institution, clergymen were prohibited from performing their duties, even from the performance of marriage and divorce ceremonies, and a governmental institution by the name Army of Religion was created to replace clergymen, preachers and other religious leaders. More importantly Imam Khomeini, the most important opposition Ulama to the Shah's regime, was exiled and sent to Iraq. Everything seemed under control.

However, later events showed that there was a gap between appearance and reality, and the regime had no "foundations in the social fabric."⁹⁶ Religious institutions and Shi'at beliefs remained intact. *Marj'a'eyyat*,⁹⁷ the institution that was in charge of religious doctrines and society's leader in religious practices, remained actively present in society. In particular a revolutionary Marj'a by the name of Khomeini had developed a political doctrine in Shi'at. He did not agree with sporadic reaction against governmental corruptions, as had the Ulama in the contemporary history of Iran. Instead, he introduced

⁹⁵ Bonine and Kiddie 1980, p. 34

⁹⁶ Abrahamian, 1982, p. 496

⁹⁷ The senior mujtahids that have emulators called Marj'a and this institution called Marja'eyyat.

the theory of *Velayat-I Faqih*. According to this theory Islamic society should be ruled in accordance with the Holy Law (the Islamic law), and only an Islamic scholar, and an expert in jurisprudence (the *Faqih*) could have a sufficient knowledge of the *shari'a*. Therefore leadership in an Islamic country belonged by right only to a *Faqih*.⁹⁸ He justified his theory through the Quran and Shi'at tradition.

Economic, moral and political corruption in the regime provided Khomeini with a suitable platform to provoke a strong reaction. In particular, his general position as Na'ibul Imam (Deputy of Imam Mahdi), his charismatic personality that typically he borrowed from infallible Imam (the hidden Imam), being *sayyed*,⁹⁹ and his extremely simple life (like the lowest and poorest people) made him extremely popular: a hero. For him, not only there was no separation between mosque and state, but the state was an agent for the performance of Holy Laws. He was fully aware of Iranian religious and national sentiments. He followed the Imam Hussein strategy and *Aushara*,¹⁰⁰ believing that, blood defeats the sword. Therefore, he asked the people to come peacefully to the street and oppose the government.

⁹⁸ Moojan 1979, p. 7

His ideas developed in books by the name *Kashfol Asrar* and *Velayat-I Faqih* in 1942. See; zabaida Sami 2004, p. 191

⁹⁹ Sayyed is a person who decentred from prophet Mohammad or Imams. The persons that have this family tree are more respected in society, especially when they became religious scholar. They wear black turbaned.

¹⁰⁰ Shi'at believes that it was the Imam Hussein blood that defect caliph *Yasid* and his dynasty, *Bany-Omayyuh*.

"In the mid-1970s the Shah's regime seemed as durable as the massive dams he built and proudly named after his relatives."¹⁰¹ He was so proud that he sent his army, equipped with ultramodern weapons, to stamp out rebellions in places far away from Iran such as Oman. He had destroyed or suppressed political parties and intellectual opposition, and so turned to attacking his religious opponents. A state newspaper (*Ittila'at*) published a diatribe against the anti-regime Ulama in particular, Imam Khomeini.¹⁰² This exceeded the threshold of people's sentimental and religious tolerance. The article caused outrage, and holy city of Qum, the bazaar, and Houzeh closed down. Theology students and their supporters took to the streets and clashed with police, while the crowd shouted "we do not want Yazid government",¹⁰³ "we demand the return of Ayatollah Khomeini"¹⁰⁴ and "we demand public apology". Some people were killed or injured.¹⁰⁵

A new wave of demonstrations commenced. The fortieth day of the Qum massacre was commemorated in all major cities of Iran.¹⁰⁶ There were peaceful demonstrations against the shah and the symbols of his state. There were occasional violations against banks, "because they transgressed the Islamic taboo against usury, pornographic films and movie houses because they violated the puritanical mores of the

¹⁰¹ Abrahamian 1982 p. 496

¹⁰² Ibid., p. 505

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ There was no official and reliable statistic, officials believed just two were killed but opposition groups announced that hundreds were killed or injured.

¹⁰⁶ It is a religious commemoration that is held in third, seventh, and fortieth days of death to mourn the dead.

society."¹⁰⁷ Tabrize (the second city of Iran at that time) destroyed all governmental banks: "as European eyewitnesses reported that banks lost all their records but 'not a single' cent from their till."¹⁰⁸ This illustrates the fact that it was mostly a sacred and religious uprising, people were not concerned with themselves or material interests.

Fortieth commemorations¹⁰⁹ came frequently and the wave of Revolution rapidly swept the whole country; mosques, universities and other social groups were actively involved in revolutionary¹¹⁰ activities. The holy Ramadan months arrived on August 5 1978, and demonstrations and strikes intensified. More massacres, more holy martyrdom and more eruption of emotions against the regime ensued. Muhrram month began on December 2. Even under normal conditions in this month, in particular *Tasua and Ashura* (ninth and tenth days of the Muharram), religious emotions are at their highest level. It was a time for the Shi'at people (who always address the Imam Hussain with, I wish I were with you and were killed with you to achieve eternal prosperity) to prove their honesty and loyalty. The historical dynamism of Muhrram ceremonies had been restored and even multiplied through the experience of a historical religious epic. Now people had wholly abandoned their material life and interests and were struggling to sacrifice themselves for their sacred values. Millions of people took part in mourning ceremonies and thousands of them wore white shrouds "to show their willingness to be

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Traditionally there is a commemoration in the fortieth day of individual's death.

¹¹⁰ I did not address the role that played by intellectual and universities, because it is not a comprehensive study of the Revolution. It should be mentioned that their role had never been less crucial than other social groups. But all classes including intellectuals, secular politicians paramilitary religious and communist groups supported the Revolution that directed by the Imam Khomeini.

killed."¹¹¹ The Leader of the Revolution exhorted the public to make more sacrifices until blood triumphed over the sword and Islam over the "pagan" Pahlavi's¹¹².

No soldiers dared to shoot their fellow citizens mourning the Imam Hussein, as they regarded themselves as members of the mourning band.¹¹³ Instead they sometimes shot their commanders. As the New York times reported "the military decided to backtrack during Muhrram."¹¹⁴

Finally, on February 1, some three million turned out into the streets of Tebran to hail Khomeini's triumphant return. Khomeini, the Prophet and strategist of the revolution, had come home,¹¹⁵ to establish Islamic government, deliver social justice to the deprived masses.¹¹⁶ Thus, religion played its part in unifying sacred collective sentiments, mobilising the masses and defeating the Shah's political system. It was a time of materialization and institutionalization of religious ideas. The political system attempted to keep religious rationalities and sentiments alive and manipulate them against political problems like crime.

¹¹¹ Ibid., P. 521

¹¹² Khomeini 27-10-1978, pp. 1-4 cited in Ibid

¹¹³ Ibid., p. 523

¹¹⁴ Ibid

¹¹⁵ Ibid., p. 526

¹¹⁶ Ibid., p. 522

I-3 Sacred political system and penal policy

These sacred emotions and rationalities strengthened the infrastructure of Iranian social solidarity and led to the victory of the revolution in 1979. These foundations, accompanied by the political enthusiasms of revolution, inflamed and multiplied passions and emotions such that no dam could resist them. The relation between mosque and politics was strengthened and talk of separating of religion and politics became taboo for around two decades.¹¹⁷ A political system based on the ideology of Islam, the "Islamic Republic", was established in 1980.¹¹⁸ One of the prime aims of the Revolution and the Islamic Republic was performance of Islamic law and this occurred especially in criminal law. This is because in other legal areas either there was no significant gap between existing law and Islamic law, like civil law, or there was no alternative Islamic law, and there was no contradiction between existing law and Islamic principles, as with administrative law, modern commercial law and so on.

However, in the sphere of criminal law, the state of affairs was totally different. The existing law was founded on western values, but there was a rich system of Islamic procedural and substantive criminal law, and it was insisted religiously and politically that it must be applied, because penal practice was seen as an expression of society's morality which was simultaneously aimed at maintaining the integrity of the social

¹¹⁷ Those who do not believe this theory were considered as dissidents, deprived of some rights and sometimes prosecuted. For example a famous Iranian philosopher by the name Soroosh who is now working with western universities in America, Britain and Germany was not allowed to teach in the Tehran University, because, he tried to introduce idea of separation between mosque and politics. He sometimes called the Iranian or Islamic Martin Luther.

¹¹⁸ The Ministry of Culture and Islamic Guide, 1990, p. 25

system. It was for precisely this reason that immediately after the revolution the leaders of the revolution attempted to appoint *Mujtahids*, and other religious jurists that had traditionally studied Islamic law in Revolutionary and other criminal courts. These courts were based on Islamic principles, as there was no enacted Islamic criminal law; non-criminal courts were still mostly managed by university-trained lawyers. As a result, the content, shape and performance of criminal justice entirely changed after the Islamic revolution.

After the establishment of the Islamic Republic the political system as a whole gradually became a sacred, but sacredness also attached to other political and social institutions and characters. Leaders of the revolution (now politicians) who had witnessed the forceful power of religion tried to associate the concept of sacredness with political and social notions. Indeed all other social and political institutions attempted to lay a protective shield of religion around themselves. Terms like sacred regime,¹¹⁹ sacred judiciary system,¹²⁰ sacred parliament,¹²¹ sacred *Rohaneyyat* (clergymen institution),¹²² sacred family institution¹²³, sacred war against violators¹²⁴, even sacred charity institutions,¹²⁵ sacred city, sacred society and so on, became part of everyday speeches of

¹¹⁹ Dorry Najafabady General Prosecutor of Iran, 30-1 2005, ISNA and Hashemi Shahrody Mahmud Head of Judiciary Ibid 31-1-2005

¹²¹ Moin Mustafa the Minister of Education Research and Technology, 4/12/2002 Iran Newspaper (Official Organ of Government)

¹²² Khatami Ahmad 4/2/2005 member of Religious Teachers of Qum's Houzeh (seminary) Association, www.Baztab.com

¹²³ Constitution law, 1990, article 10

¹²⁴ Every year anniversary of violation of Saddam against Iran commemorate as "sacred defence". See Hashemi Shahrodi, Head of judiciary ISNA 31/1/05

¹²⁵ Dorry Najafabadi. General Prosecutor of Iran 16/2/2005, ISNA Press

politicians, journalists and judicial officials. But it was considered that “the judicial system is the most sacred of institutions, because it does the most sacred jobs.”¹²⁶

The Revolution was considered as a “divine gift”¹²⁷ that “must strongly be protected”.¹²⁸ The judiciary became the most important institution in guarding against “any violation of sacred values”.¹²⁹ The existence of originally sacred issues like religion itself and sacred values, holy figures like prophets and the Imams, and secondary consecrated subjects like the political system, political institutions, political figures, social security and so on, brought about a long list of crimes and heavy punishments that were unknown previously. Purely religious crimes like *Ghazf* (attributing sexual intercourse to men or woman)¹³⁰, every kind of illegal relationship and physical contact between man and woman, adultery,¹³¹ rape (man or woman),¹³² incest¹³³, *Moharebeh*,¹³⁴ use of arms, homosexuality (men or women), insult to prophets, imams,¹³⁵ apostasy gambling,¹³⁶ and drinking potentially carried severe punishments.

In addition, crimes or insults against government, the supreme leader, Imam Khomeini, Ayatollahs (*Maraje*), President, Ministers, MPs, and members of Guardian

¹²⁶ Ibid

¹²⁷ Messbah, 18/2/2005, ILNA

¹²⁸ Mortazavi 16/2/2005 ISNA

¹²⁹ Iran newspaper 23/8/2003

¹³⁰ Jahangir, Islamic Penal Cod. 2000. Articles 139 to 164

¹³¹ Ibid., Articles 63-81

¹³² Ibid., Article section o

¹³³ Ibid., Article 82 section A

¹³⁴ Ibid., Article 183-196

¹³⁵ Official Newspaper 1997. Article 513

¹³⁶ Ibid., 701-710 and 166-180

Council¹³⁷ entered the Iranian penal code, and depending on the intention of the offender, could lead to death or prison. The conspiracy theory that indicates the active omnipresence of the enemy in all social, cultural and political fields played its role in the transformation of penal policy. The prime targets of this enemy were seen as the Islamic revolution, Islamic republic and Islamic values as the foundation of a new social cohesion in new society. It was believed that the battlefield had transferred from an openly military war to a secret undermining of the foundations of the political system, and the ideology of Islam. This enemy was assumed to be sophisticated, well equipped, and cruel. The constant presence of that enemy is still dominant in the political discourse of the revolution, in particular amongst officials and conservative politicians. Imam Khomeini deliberately produced the idea of *Great Satan* as a religious-political symbol for the USA and international tyrants, and placing this conception at the centre of all his foreign policy. These ideas were highly effective in developing social integration. They were symbols of powerful international enemies of the country who caused all social, moral and political corruption. He declared that the "Iranian nation today is under attack by tyrants of the world. It is a real war although it is not constantly a military fight."¹³⁸

The international enemy is assumed to be an "enemy of religion,"¹³⁹ attacking Islamic society to try to undermine its strong culture and morality. The head of the judiciary, in defending of public flogging, announced that the "endeavours of our enemy in opposition to Islamic aspects of our political system is aggravated, they try to increase

¹³⁷ Ibid., 514-515 and 609

¹³⁸ Khamenei Supreme Leader of Iran 19/2/2005, ISNA (Iranian Student News Agency.)

¹³⁹ Shirazy Makarem 04 -02- 04 ISNA

immoralities and corruptions. Hands and plans of enemies are visible behind the scene of crimes and social corruption."¹⁴⁰ These conditions make the "judges duty highly crucial."¹⁴¹ Thus, all crimes could have political indications. Conspiracy theory is a multifunctional idea, increasing the cost of crime whilst legitimating the political system and justifying harsh punishment. Because, according to this, perspective criminals, as the fifth column of the enemy served the conspiracies of the complicated and powerful enemies; they are going to increase immoralities in society, destabilize it, weaken social solidarity and finally subordinate or exploit society. Thus, restrictive and harsh punishment is functional and useful.

The IPC became very concerned with the intentions of criminals. There is a long list of crimes that normally carry sentences of a few years of prison, but the same crimes, accompanied by political motivations, will be sentenced with death. For example, arson (five years jail without political motive, death without),¹⁴² attempts to assassinate key political and religious figures like *marja'* Supreme Leader, Parliament's Speaker, President and so on (3 to 10 years jail without political motive, death with),¹⁴³ creating a group or quasi-group in order to disturb national security (2 to 10 years jail or death),¹⁴⁴ resorting to weapons (from petty punishment to death),¹⁴⁵ and membership of opposed armed groups (from 2 to 10 years imprisonment or death).¹⁴⁶ Likewise those crimes that

¹⁴⁰ Social corruption in Iranian culture primarily indicates to free and illegal relationship between men and women, pornographic issues, and alike.

¹⁴¹ Hashemi Shahrody Head of judiciary 18/8/2001 Iran Newspaper.

¹⁴² Mansor Jahangir 2000, article 675

¹⁴³ Ibid., Article 515

¹⁴⁴ Ibid., Article 498

¹⁴⁵ Ibid., Article 183

¹⁴⁶ Ibid., Article 498

disrupt the economic system, like forgery of banknotes or hoarding¹⁴⁷ and so on, depend on intention of criminals (whether they are looking for their personal benefit or disruption to the political and economical system, could receive a sentence from five to twenty years to jail or to death.)¹⁴⁸

Moreover, policy-makers preferred subjective, rather than objective, criteria in determining the dangerousness of criminals. Policy-makers sometimes ignore iron principles (e.g., *actus reus*) of criminal law and punish attempted crimes as completed crimes.¹⁴⁹ In post-revolution Iran, then, criminal law reduced the constituent elements of crimes and defined offences very widely. The fewer elements there are, the fewer elements the prosecutor had to prove. This transformation seemed necessary for easier and quicker elimination of threats to society. For example, being an ordinary member of armed opposed groups is treated as equivalent to taking part in armed rebellions, fighting against the government and killing innocent people.¹⁵⁰ Once trivial criminal activities have shown the wickedness and dangerousness of the wrongdoer, there is no need for the completion of the crime.

Drug trafficking and dealing of narcotic drugs is an outstanding example of the politicizing and populist strategy of the war against crime. It was firmly believed that the existence of organized crime was a crucial part of the strategy of enemies of the country. The Islamic Republic showed a zero tolerance policy against any kind of illicit traffic in

¹⁴⁷ Storing and concealing of public needs in order to sell more expensive.

¹⁴⁸ Official Newspaper. 1991, p. 3 These crimes must be prosecuted by the Revolutionary courts without delay or waiting their legal turn.

¹⁴⁹ Of similar development in USA. See p, 185-186

¹⁵⁰ Ibid., Article 186

narcotic drugs and psychotropic substances. It considered increased drug dealing as a "national threat"¹⁵¹ aimed at youths and teenagers (75% of Iran's population), and treated it as a real war. For example, from 1998 to 2004, around two million drug dealers were arrested, 9573 armed conflicts took place, 11,172 bands and groups of drug traffickers were destroyed, and 4000 drug dealers were killed by governmental forces.¹⁵² From 1979 to 2005, 3350 police or other revolutionary and security forces were martyred, and 10,000 were handicapped in this sacred jihad.¹⁵³ As a result of this "75% of prison space was occupied by criminals directly (53%) or indirectly (22%) related to drugs."¹⁵⁴ There is no valid statistic for the number of the death penalties carried out, but considering the intensity of the war against drugs, harsh legal punishment (death penalty for possession of five grams of heroin), the anger of society against this crime, the iron will of government and judiciary for eradicating this destructive offence, the massive amount of drugs found, and great numbers of criminals arrested generally suggest, that use of death penalty has been very high. Notwithstanding these great efforts, Iran has not been successful in its war against drugs.¹⁵⁵

I-4 Political System

Iran's complex political system is a combination of "elements of a modern Islamic theocracy with democracy,"¹⁵⁶ in which sovereignty theoretically belongs to God

¹⁵¹ Iran Newspaper. 23/9/2005

¹⁵² Ibid. This statistics does not include those criminals who sentenced to death. They are killed in armed conflicts against police and other governmental forces.

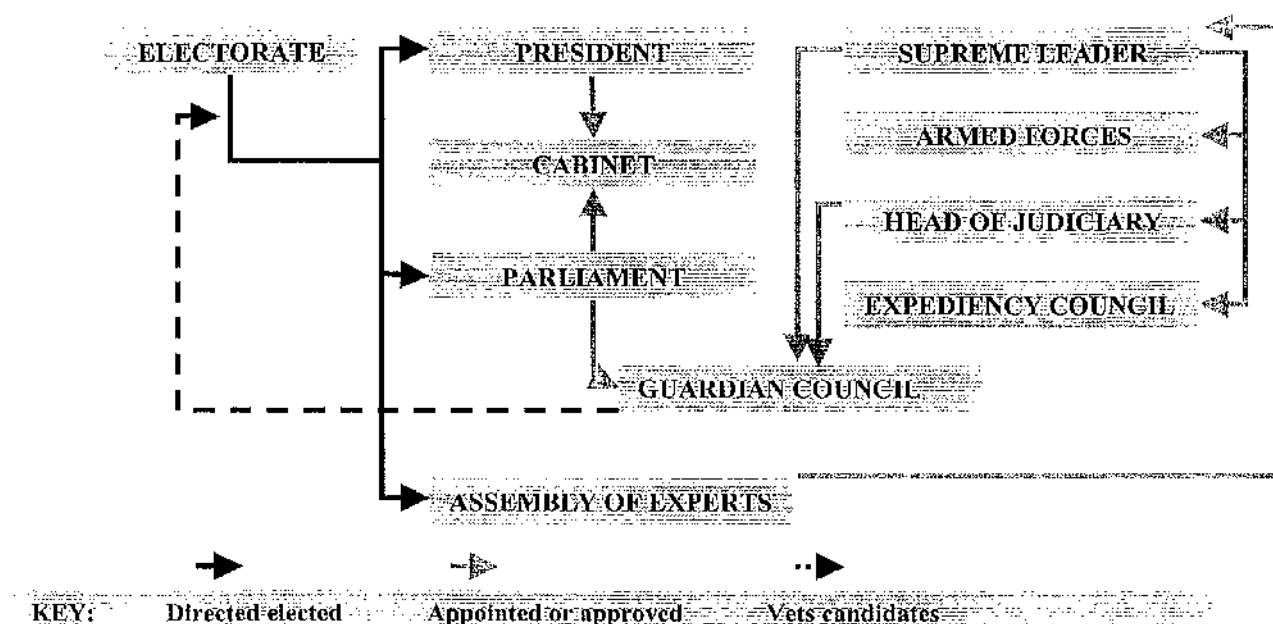
¹⁵³ Ibid Jihad means sacred war. Sacred jihad terms used for more emphasis on its sacredness.

¹⁵⁴ Homicides, thefts, immoral crimes and so on that related to drug dealing or addiction

¹⁵⁵ Gouverneur Cedric March 2002 Le Monde Diplomatique

¹⁵⁶ Constitution Law Article 56

and the determination of the political and social destiny of society has been gifted to individuals by God.¹⁵⁷ Almost all requirements of democracy like freedom of speech, free newspapers, free parties and other civil institutions, free elections, equal rights and so on, are confirmed by the constitution.¹⁵⁸ The only restriction is that political institutions are not allowed to make decision against Islamic ordinances and the constitution,¹⁵⁹ except where necessitated by the members of the Expediency Council¹⁶⁰



¹⁵⁷ Ibid

¹⁵⁸ See Ibid Articles 6, 7, 19, 20, 23, 26, 27 and so on

¹⁵⁹ Ibid., Article 4

¹⁶⁰ Ibid., Article, 112. They are appointed by the Supreme leader, and are authorized to recognize these qualifications.

As the graph shows the electorate directly or indirectly elects all key political actors and governmental institutions.¹⁶¹ All politicians are accountable constitutionally. Moreover, national and international political conditions, civil crises and war, the actual and imaginary enemies of the political system, the revolutionary condition of society, international boycotts, and the inseparable relationship between mosque and state have provided political conditions where there is a constant and reciprocal relationship between public opinion and the political system. Members of parliament, as the only institution that has the right to legislate,¹⁶² are directly elected by the people without any particular *legal* restrictions.¹⁶³ However, supervision of the election by the Guardian Council has been somewhat controversial, because it has gone beyond its constitutional rights and disqualified considerable numbers of candidates. Public demands and public opinion have always been an important concern of Iranian politicians. As the supreme leader stated "people are the roots of the political system and this political system relies on the thoughts, votes and beliefs of the people."¹⁶⁴

Unlike Weber, who does not recognize current public opinion as a source of legitimacy in society, the political system has to struggle to convince the public on any controversial political and social issue. In an analogy with a Freudian psychological analysis of personal character, social morality can be divided in two sections: conscious and unconscious. Public opinion constitutes the conscious part of social morality that

¹⁶¹ There is an exception about Supreme Leader who elected indirectly and permanently, till he has not lost qualifications of leadership or has not died or resigned. See article 107-108

¹⁶² It is true that occasionally Guardian Council disqualified candidates of parliament, but constitutionally there is no obstacle for being a member of parliament.

¹⁶³ Ibid., Constitutions Law Article 71.

¹⁶⁴ Khamene'ei Supreme leader of Iran. 09-03-01 Iran Newspaper

actively responds to the social and political events. Unconscious social morality is potential social morality, rooted in historical social notions that dynamically affect collective consciousness. This is why historical and genealogical study of social institutions is crucial to a better understanding of current social events.

However, the judiciary in the Iranian political system has never been free of political tensions.¹⁶⁵ On the contrary, the judicial system has always been at the centre of the most controversial political issues. For them the protection of the political system, social values and the satisfaction of the public have been constant concerns.¹⁶⁶ They deny the allegation that they have support conservatives over reformers and that they have restricted reformist politicians and press, claiming that if reformist politicians and medias are prosecuted, it is simply because they have committed crimes. They never denied their participation in policymaking and the performance of policies required by the Islamic Republic of Iran.

¹⁶⁵ Judiciary's officials frequently talk to people through T.V, newspaper and other medias. Judiciary has particular speaker that every week takes part in a Press Conference and answer media's questions. He and other judiciary's officials questioned about political criminals, their future, and other remarkable and controversial cases. Head of judiciary accompany with a team of his colleague every week takes part in a public meeting and hears people's complaint against claimed unfair judicial verdicts and issues orders for reconsideration.

Head of judiciary said; 'accusation of politicization to judiciary is unfair'. Iran Newspaper. Jun 24 2002 but their reformers are not agree with him, they believed that judiciary system is firmly against reformers. The judiciary banned around hundreds of newspapers that all of them supported reformers, because they assumed as 'supporters of west and the U.S.A. See Dorry Najafabadi Ghorbanali, Previous Minister of Security and Present General Persecutor. Iran Newspaper Mar 1 2001

The judiciary's head of international affairs acknowledged that Iranian judges were politicised to some degree and such cases had damaged the judiciary's image abroad. See Iarjani mohammad javad http://www.dailytimes.com.pk/default.asp?page=story_23-1-2004_pg4_21

¹⁶⁶ Mahmod Hashemi Shahroodi. Head of the Judiciary 10/2/2005, ISNA . Head of judiciary believed that, in critical conditions in particular, political, security and economical crises, which all of them are due to foreign and international tyranny's propagandas, our cultural, security and judicial institutions acted against political and press corruption and secured our nation and political system. Regarding our inefficient facilities it is miracle of judiciary that secured political system against gigantic dangerous.'

However, achieving public satisfaction and justifying the performance of punishment is a significant concern in the criminal justice system. This is because, on the one hand, the political system, in current internal and international conditions, clearly needs public support and on the other hand, they cannot easily ignore "heavy pressure of public opinion in their policy and sentencing."¹⁶⁷

The striking case of "*Pakdash*" demonstrates how public opinion affects the criminal justice system. A young criminal by the name of Bijeh was arrested in September 2004 for raping and murdering twenty-two children. He had been arrested after killing around 8 children, but was released because of insufficient proof. As a result, a wave of "anger and harsh criticism swept the whole country."¹⁶⁸ It was considered as a scandal and crisis for the judiciary, police forces and even the whole political system. The president Khatami, who had patiently tolerated massive political crises, criticisms and pressures on behalf of powerful conservatives, during the previous seven years, for the first time talked about his resignation. The "Iranian chief of police apologized to people and the victims' family and promised great transformations in crime control policy."¹⁶⁹ Four prosecutors and judges, and sixteen police officers¹⁷⁰ of *pakdash*, were prosecuted because of their failures in this case.¹⁷¹ The general prosecutor announced that there was no explanation or defence in such an event. The Higher Council of National Security attentively considered the issue. Newspapers played their role; they

¹⁶⁷ Seraj Head of the Tehran Province's Criminal Courts, 18-08-04 ISNA

¹⁶⁸ BBC News Persian 23-09-04

¹⁶⁹ ISNA 19-08-04

¹⁷⁰ Ibid

¹⁷¹ BBC News Persian 12-09-04 and 15-09-04

called it an "unprecedented felony in the history of Iran."¹⁷² The case was considered as a "national disaster and the accused was subsequently prosecuted outwith normal criminal procedures and the court sentenced him to 16 times execution, flogging, and paying 16 Deyeh shortly after final trial."¹⁷³

By contrast, the case of Aghajari, a university lecturer who was convicted of apostasy in November 2002, and sentenced to death, prison, exile and deprivation of some social rights, "sparked the largest student protest for (two) years."¹⁷⁴ The higher court eventually reconsidered the sentence and released him from detention. Lately he has been acquitted of all charges except a trivial charge, and sentenced to the time he had previously served. This new sentence is considered a discretionary verdict, because less than that was problematic and for the Judiciary.¹⁷⁵ Because it was difficult to explain how an accused has been detained for more than his sentence.

University students, particularly in the capital city Tehran and other major cities of Iran, have historically been in the vanguard of social movements. They are often described as the sensitive antenna of society. They have played a crucial role in contemporary social and political movements. They react rapidly reaction to social and political problems, and other social groups occasionally follow their reactions and protests. Because of this the University and students, as symbols of intellectuals, are considered as revivals of clergymen. Thus, their protests should be at least partly treated

¹⁷² Iran Newspaper. 12- 08-2004

¹⁷³ Khorasan newspaper 13-08-04

¹⁷⁴ http://news.bbc.co.uk/1/hi/world/middle_east/3681229.stm

¹⁷⁵ It was not possible to explained how one could be detained more than his final sentence.

as a symbol of public opinion. The case of Pakdasht also illustrates the strength of public opinion, and the difficulties faced by the judiciary and officials in convincing the public that they are serious and powerful enough in responding to criminal activities.

It should be mentioned that newspapers, weblogs and websites nowadays play a crucial role in addressing penal policies. After the closure of most reformist newspaper¹⁷⁶ during last six years, they changed the focus of their critical discourse from highly sensitive political issues to more social subjects, such as penal practice. These days all newspapers have a page of 'social events' that are primarily criminal reports, in particular political crimes and public penal practices like public executions. There is interaction between public opinion and journalists. On the one hand their reports inform the public and provoke their sensitivities to responsive issues; on the other hand, the public psychologically and financially support and encourage them. Since that shift of attention, the influence of newspapers and independent presses has significantly increased; as result, the judiciary has tried to interact with them. The Head of Tehran Province Bureau of Justice has asked correspondents to prevent public suspicion and vilification of the judiciary.¹⁷⁷ In spite of this, the judicial system is still harshly criticised by journalists,¹⁷⁸ forcing the judiciary to try and compromise with them- promising that

¹⁷⁶ Temporary confinement is a legal terms that means judicial officials authorized to temporarily stop some activities that they recognized as harmful for society. In this case temporary confinement has been unlimited and there is no expectation of release.

¹⁷⁷ Alizadeh Abassali, Head of Tehran province Bureau of Justice 16/2/2005 ISNA

¹⁷⁸ Sehkarkhiz Fesa, previous general manager of Presses in Khatami's Cabinet and present member of Defence of Press Freedom Association and a journalist, said; "judiciary treated presses as prostitute and dangerous criminals." <http://www.enrouz.com/Info/showitem.aspx?ID=558P=1>

He indicated to "probation Law 1941" that was about incorrigible criminals and used by judiciary for banning newspapers.

prison sentences for journalists would be abolished and journalists treated respectfully.¹⁷⁹

At least theoretically, they have admitted that there are differences between 'journalists criminals' and other criminals.¹⁸⁰

1-5 The Iranian Prison system and religious programs

As Weber noted the, "promot [ion] of bureaucratic centralization in modern Persia (Iran)"¹⁸¹ began at the start of the twentieth century. Since then bureaucracy has been a huge part of Iranian government including that of prison. As a result of the rising rate of criminalization and rising rate of crime, the prison was installed at the centre of the criminal justice system, with more and more prisons being built, throughout the country. The prison system in Iran is a legacy of the rehabilitative ideal that was the overarching ideology of the pre-revolution penal system. The Iranian penitentiary system is a centralized, bureaucratized and to some extent a professionalized system. It is supervised by the head of judicial system. The presence of experts, such as psychiatrists, criminologists, and physicians, is a sign of the previous rehabilitative system.¹⁸² Rehabilitative training, treatment of personal and social diseases and forbearance of punishment are legally determined goals of imprisonment.¹⁸³

¹⁷⁹ Shahroodi Hashemi, Head of Judiciary. 29-03-05 Etemad Newspaper

¹⁸⁰ Alizadeh Abassali, Head of Tehran Province Bureau of Justice. 01-03-05 Aftab Newspaper. He said; there must be difference between a journalist and a murderer.

¹⁸¹ Weber 1948, p. 213

¹⁸² Regulations of Institution of Prison, 1994, Article 44

See; WWW.ghavanin.com/detail.asp?id=9575

¹⁸³ Ibid, Article 3

However, closer attention to the Iranian prison system shows that the Iranian criminal justice system has manipulated the bureaucratic system of the prison, and all professional and non-professional staff serve as an instrument of moral and religious values. The Iranian penitentiary is intended to reform criminal behaviour, through religious education, preaching, regular daily prayers, worship, and control of religious and moral behaviours. It is believed that all correctional efforts achieve their best results through religious purgatory and self-control. Praying, worshipping and taking part in other religious rites are considered to be the best methods of purification. The prison chaplaincy is one of the most active sections of the Iranian penitentiary system.¹⁸⁴ Though these religious programs include non-Muslim prisoners as well. These prisoners should be trained according to their own religious ceremonies.¹⁸⁵

Nowadays prisoner well-being is the most important aim of the religious institutions in prison. These institutions try to subordinate rehabilitative programs to religiously educational and ritual efforts. These religious efforts are seen as crucial contributions to the inmates' reform. All programs are supervised by clergymen, or are in some way related to religious beliefs. Religious institutions control the libraries, and most of the library books are religious or at least contain moral messages. There is little place for purely secular reformers to focus on rehabilitation outside of a theological framework. For example, preaching or taking prisoner to religious ceremonies outside prisons like Friday prayer is a regular activity.

¹⁸⁴ For all see Ibid Articles 9-12-13-43-45-47-72-129-171-208

¹⁸⁵ Ibid. Article 166

Thus, imprisonment in Iran follows two apparently different agendas, reformation and punishment. It has been legally announced, and theoretically insisted on, that prison is a punishment, and that prisoners should be expected to lead a restricted and hard life. Thus, the expiatory character and deterrent effect of imprisonment have not been forgotten. But it should be noted that both aspects of the prison, punitive, corrective, simultaneously serve the same goal: strengthening and supporting society's morality. For example, the family is seen as a basic unit of social structure which occupies a crucial place in Iranian penal policy. Thus, prison officials are obliged to support the prisoners' family, and maintain regular relationship between prisoners and their families. Conjugal visits, for instance, are widely accepted. The above brief description of imprisonment tells us, also, that there is not necessarily a contradiction between the process of bureaucratization, professionalization and secularization on the one hand, and the emotional, cultural and religious character of punishment on the other.

I-6 Crime Control Policy

A passionate and emotional punitive system does not permanently and necessarily contribute to the formation of an irrational and disorganized penal system. As Durkheim argued, vengeful emotions should be understood as the energy and engine behind penal policy, but these social pressures can be modified, graduated and represented in various forms. Punishment might be performed in its most modern form but still preserve its moral expression. The sacredness of social values, high crime rates, public concerns about crime and disorder, and political considerations can give rise not only to harsh

penal practice, but also to tough and sophisticated crime control policy and law enforcement. For Iranian policy makers there are interrelations between crime, order, revolution, religion, politics and the concept of the enemy. Every crime can potentially be considered as an act against revolution, religion, government or an act of an enemy's agent. In the post-revolution era, the fight against crime is assumed to be the general duty of everybody. Crime is committed against the collective consciousness and therefore should be responded to collectively. Because of that it is theoretically, legally and practically hard to single out a particular institution as the only agency responsible for crime control policy. For example, the Islamic Revolution Guards Corps as an army, police, security forces, par-military forces or other voluntary groups all consider themselves more or less in charge of crime control. Parallel practices in the same field occasionally give rise to tensions and conflicts.

In addition to official police forces, created in 1992 (previously rural and urban police forces mixed with a revolutionary committee that performed simultaneously with them), *Basij*¹⁸⁶ paramilitary volunteer forces supervised by the Islamic Revolution Guards Corps are present in every urban, rural and bureaucratic jurisdiction.¹⁸⁷ Although *Basij* originally established to defend the country in wartime, it gradually transformed into a revolutionary force against every disorderly activity that threatened society. It is true that the battle against the hidden foreign enemy has settled down, but it has been

¹⁸⁶ Official Newspaper, Ministry of Justice 1980, No. 10328

This quasi-military institution was established by the Revolution Council in 1980 and played crucial role in Iraq-Iran war from 1980-1988. This institution played simultaneously as a police force in every local place.

¹⁸⁷ It is a powerful Revolutionary Army, beside main Arm, that act both like Army in borders and as a police and security force when is necessary.

continued on other fronts, such as the war on crime, and the fight against immoral behaviour. These battles are considered as another sacred war against secret agents of the enemy. It is for this reason that paramilitary forces and institutions, established for war, became actively involved in the area of crime control.¹⁸⁸

Hostility against corruption, immoral acts and crime became part of the everyday activity of all the social institutions. There are supervisory bureaus in the centre of the every bureaucratic jurisdiction that control both administrative affairs and criminal activities. There are representatives of the Ministry of Security in other ministries and governmental organizations while manage all activities against the revolution, the government, and others anti-security activities. As a peripheral task they independently, or in co-operation with other forces, take part in crime control policy.¹⁸⁹

The Institution of Social Protection is an expanded agency of crime control that was created in accordance with regulations issued by the Head of the Judiciary, and is managed by the Bureau of Justice across the country. This institution co-operates with the judiciary through neighbourhood control and reporting crimes to the judiciary, and is occasionally involved in law enforcement in trivial crimes. Furthermore,

¹⁸⁸ For example, as ISNA reported Basij forces, performed an operation in 10/2/2005 in 15 provinces and sized remarkable amount of Narcotic drug, wine, cassette, CD, guns and other prohibited materials. These materials and accused submitted to the justice Bureau.

¹⁸⁹ Law of Establishment of Islamic Republic Security Ministry. 1984

in the Islamic Republic of Iran, *amr beh Ma'raf wa nahye az munkar*¹⁹⁰ (calling for good and preventing of immoral behaviour) is a universal and reciprocal duty that must be fulfilled by the people with respect to one another, by government with respect to the people, and by the people with respect to the government. The conditions, limits, and nature of this duty will be specified by law.¹⁹¹

Accordingly, another institution by the name of *Amr beh maruf wa nahy az monkar* was established, and acts in all cities and towns. This institutions, supervised by clergymen, tries to prevent the demoralization of youth through speaking to them in the streets and asking them to behave themselves, and in particular asking women not to appear in public without a proper *hijab*.¹⁹² Occasionally they help other security or police forces through reporting immoral activities or arresting wrongdoers.

In addition to the several institutions mentioned above, after the presidential election in 1998 and Khatami's triumph over the conservatives, new agencies of control were established or developed in Iran. Conservatives were suspicious of institutions that were under reformers' control, such as the Ministry of Security. They believed that the reformers were not serious enough in the fight against dissidents, immorality, and cultural and political deviants. Since then, they have installed or supported 'parallel institutions' alongside other official establishments of control.

¹⁹⁰ It is a Quranic principle, based on an Ayeh 71 Sura 9 which strongly held by shi at. This rule indicates that all Muslims are reciprocally responsible and should prevent each other and government from bad behaviours and recommend for goods.

¹⁹¹ Constitution Law 1990 Article 8

¹⁹² According to article 638 of IPC this kind of behaviour considered as a crime.

The institutions mentioned above mostly developed through a process of governmentally supported privatization and public involvement. This policy is assumed to be a less costly and more efficient way of dealing with crime. This approach sought to fill the gap between government and society, strengthening collective consciousness and social solidarity,¹⁹³ and immunizing the political system against conspiracies and opposing groups. Therefore, politicians endeavoured to install more quangos and non-governmental groups in the crime control area.

Those official institutions that in some way are charged with crime control have lately intensified the movement toward privatization. Perhaps politicians and policy makers have recognized that a preventive policy is more efficient than a punitive approach. Moreover, as will be discussed below, the political system is under pressure from international organizations due to the carrying out of some physical punishments.¹⁹⁴ Therefore the judiciary established Social Protection Institution in 2004, and simultaneously police began to install local police.¹⁹⁵ Moreover, the judiciary system expanded a kind of restorative justice system across the country and submitted all less serious cases to non-professional judges. This policy has allowed the judiciary system to deal with more important cases.

¹⁹⁴ German Radio, DW-World. DE Deutsche Well 14/1/2005 for example reported that; European Parliament members asked Iran to abolish death penalty immediately and amend the Islamic Penal Code.

¹⁹⁵ Hossieny, Commander Chief police of the North Khorasan Province 9/2/2005, Khorasan Newspaper

II Changing Culture of Crime and Punishment

The study of punishment in Iran after Revolution of 1979 can strongly demonstrate how patterns of penal practice in societies broadly follow the social, cultural and religious values of that society. It is a striking example of the correspondence between changing models of repression and transformations in perceptions and attitudes.

II-1 Changing Conceptions of Criminology, Crime and Criminal Law

As argued, for Iranian traditional judges,¹⁹⁶ conceptions of individualization, psychological and sociological cause of crimes, and other criminological notions seemed strange. What they have learned are divine rules, in which everything is determined previously. This traditional criminal law has developed over a period of fifteen hundreds years. Historically there had been little opportunity for application of these penal codes. The Islamic Revolution 1979 was the first opportunity for systematic performance of the Islamic penal codes for more than a thousand years. As mentioned above, all these traditional criminal texts were translated and codified as the Iranian Penal Code. It is true that the judge is bound to judge each case on the basis of the Penal Code, but in case of

¹⁹⁶ After the Islamic Revolution, almost all revolutionary courts and most other criminal courts were ruled by clergymen or judges that had studied Islamic Criminal Law (*Feqh*). This system of criminal justice traditionally includes definitions of crime and determinations of punishment. These criminal conceptions are collected in conventional texts called the Books of Hodod, Ghesas, Deyat, and Tazirat. (See: Faez 1991, pp. 125-40) These criminal texts are very similar to penal codes, but they are accompanied with a full account of their theoretical and religious permission. They define crimes, specify their particular penalties, method of prosecution, performance of penal practice and so on. They can be considered as both substantive and procedural criminal law. The books mentioned, in addition to similar books in the area of civil Law, commercial Law and the like constitute the Islamic jurisprudence of the Shi'at branch.¹⁹⁶ All religious students (called *Talabeh*) who are going to be a *clergyman*, a *Faghih* (*Mujtahid*) or an Ayatollah (*marja*) must study Islamic Jurisprudence in Houzeh

the absence of enacted law, he has to deliver his judgement on the basis of authoritative Islamic sources and authentic fatwas (the Ulama's comments). The judge, in the case of the absence or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgement.¹⁹⁷ As mentioned previously, sometimes judges resort to the Quran or other authorized religious texts as reference for their sentences or more authority for their legal verdict.

On the other hand, political and scientific tensions between these products of the religious education system (*Houzeh*) and the university- themselves a product of the west in contemporary Iran - brought about a suspicious climate, in which judges did not allow themselves to take criminological concepts into account. Their distrust of, and unfamiliarity with, modern criminological ideologies like rehabilitation marginalized concepts like individualization, rehabilitative treatment and so on from the process of sentencing.¹⁹⁸ Moreover, there are considerable numbers of Islamic punishments that are inflexible. Penal practices of *Hodood* and *Ghesas* are absolutely fixed in respect of type and amount of punishment in various circumstances. For example, intentional killing must be punished through the retaliation mechanism and neither legislator nor judges can make alternative decisions.¹⁹⁹ In other words, the discretionary power of judges is firmly restricted in such fields.

The religious perspective on crime, criminals and punishment in the Iranian criminal justice system has had a significant impact on the severity of punishment.

¹⁹⁷ Constitution Law, 1990, Article 169

¹⁹⁹ Bazgir 1998, p. 69

Although, not all sins are considered as crime and *visa versa*,²⁰⁰ this rule covers only *Hodood* and *Ghesas* (small number of crime), while in the sphere of *Tazir*, the major part of crimes, every sin can be a crime.²⁰¹ It was traditionally up to judges (*Kadi- justice system*), and in modern societies government can identify every sin as a crime.²⁰² As a result most sins were criminalized and the list of religious crimes became longer. Moreover, as a general rule immoral and religiously prohibited activities that are performed publicly are regarded as crimes. As a result of the approximation of sin and crime in the Iranian criminal justice system, the discrete identification of crime and sin is hardly possible. Furthermore, although there are immoral wrongdoings that are not a sin, and some religiously restricted acts are not crimes, they are assumed as grounds and facilitators of sin and crime that should be prevented.

In Iranian society, not only do judicial officials and policy makers defend moral and religious values in terms of crime and punishment, but also officials, social institutions, and private sectors respond to amoral behaviour - disregarding the fact that these acts are not legally identified as crime. The Iranian judiciary, police, quasi-police and volunteer forces time and again react against immoral and religiously prohibited activities (sins). They treat these kinds of behaviour, like relationships between girls and

²⁰⁰ Crime in religious terms is an act that according to Quran or other authorized references like prophet and Imam's says faces a punitive reaction.

²⁰¹ Fazel 1991, p. 60

²⁰² There is a long list of sins that after Islamic Revolution are legally identified as crimes, while in traditional text they did not treated as crime. For example bad hejab¹, usury², committing any sin frankly in public³ place. Bribery⁴, transaction of alcohol⁵, Gambling⁶ and so on

¹ IPC. Ibid Article 638

² Ibid. Article 595

³ Ibid., Article 638

⁴ Ibid. Article 588-594

⁵ Ibid., Article 702

⁶ Ibid., Article 705

boys (talking, walking, mixed gatherings, parties and entertainments and so on), as something that must be avoided.²⁰³ Institutions like *amre beh maroof*, *Basij* and even the judiciary consider themselves as religiously responsible for taking action against such kinds of immoral acts.²⁰⁴ It should be noted that there is a strong traditional legal theory in the Iranian criminal justice system, inherited from French criminal justice and confirmed by Iranian constitutional law, that crime can only be identified by the parliament.²⁰⁵ But, there are still judges that follow another religious rule that indicates that judges are authorized to consider any sin as a crime, and sentence based on the Islamic references and their discretion.

However, the proximity of crime and sin has led not only to a longer list of crimes, but also to a harsher reaction against them. This is because, in the new conception of crime, criminals not only harm others and society but also violate godly decrees. They violate superior and sacred values and deserve to be treated harshly. Such a religious outlook, and the close proximity of crime to sin guides society, in particular religiously trained judges, to a strict approach to criminals. They view criminals, especially those who commit serious crimes, as “evil”²⁰⁶, “Satan”,²⁰⁷ “*Eblis*”²⁰⁸ and so on, and as being incorrigible in nature.

²⁰³ Sometimes these behaviours are not crime or even sin, but they are regarded as acts that undermine moral principles and are seen to lead to sin, crime and finally social disintegration; thus, they should be prohibited.

²⁰⁴ Reyahi 21-09-04 ISNA. He argued that; Regulations of Institution of Social Protection treated crimes and sins equally.

²⁰⁵ Constitution law 1990, Article 22, 32, 33, 36

²⁰⁶ Bazgir 1995 NO.3017: Five young criminals 2sentenced to death because of their Satanic’ and ‘evil’ acts of robbery and murdering four innocent victims, two men and two women.”¹ Judge called them as Satan and evil.

²⁰⁷ ISNA 18-07-04. Two members of ‘Eblis Gang group’ who found guilty as kidnapper, rapper and drug trafficker executed publicly in Najafabad city.

From an Islamic perspective, human beings are a mixed character of goodness and wickedness. Despite all social and natural obstacles, he that is equipped with a free will and is wise enough to follow divine decrees can achieve his salvation. For the public and officials, criminals (especially those who have committed serious crimes against individuals and property), are considered as individuals who have an immoral, inhuman and incorrigible personality. They follow Satan's orders and their unrestrained impulses. Committing crime is a sign of their wicked nature. In particular, if these culprits do not respond to the Islamic penalties and repeat their transgression there would be no doubt about their evil and incorrigible character. They are unpleasant and cruel persons who willingly follow their animal temptations. Terms like "Wolf", "Jackal"²⁰⁹, "Bath of night"²¹⁰, "Hyena",²¹¹ "Black", "Scorpio Band",²¹² "ruffians and rogues"²¹³ and so on are terms used by people, journalists and officials for describing criminals' personality, which shows Iranian social attitudes toward them. They are cruel men that brutally killed

²⁰⁸ Eblis is a Quranic word that is almost a synonym of Satan accompanied with stronger sense of wickedness.

²¹⁰ Etmad Newspaper, 25/02/2005

²¹¹ Esteki 20/8/2004, Etmad Newspaper, It was a report about judiciary, security and police officers' failure in pakdasht e in which 22 children raped and killed.

²¹² It is well-known nickname that typically attributes to gangs

²¹³ Mortazavi 9/9/2004 ISNA. General Prosecutor of Tehran, said; first priority of prosecution office and police forces must be harsh approach to ruffians and rogues. We must treat them so hard that they shocked once they hear our name.

His description of ruffians and rogues covers criminals of serious crimes, including; sexual harassment, acts against public decency, rape, creation network of corruption, drinking alcohol, extortion, providing a place for gambling, kidnapping threatening of public welfare, threatening people, public quarrel and alike.

innocent children²¹⁴ or old men or women,²¹⁵ and are not deserving of any sympathy or mercy.²¹⁶

Iranian people have historically regarded themselves as victims of a miscarriage of justice. It is an overwhelming belief that their first and most popular Imam, Imam Ali, was martyred because of being extremely fair in his government, judgment and equal treatment people. The most important slogan of Iranian social movements during last hundred years has been justice. For example the constitutional revolution of 1905 commenced with the demanding of a "house of justice".²¹⁷ The crucial motivation of the recent revolution in 1979 was the imagining of the Imam Ali's government. People know a large number of stories about his fair judgments, disregarding the social, political and religious positions of parties of trial. The most important slogan of Imam Khomeini was "social justice."²¹⁸

Since then, justice, in particular judicial justice, has been a principal ambition of the Iranian people. Justice in terms of equality of people in before court is frequently

²¹⁴ Hossieny Majid Shiraz prosecutor 17/9/2004, Etemad Newspaper. He said; two cruel criminals who tragically had killed an innocent child were executed in public place. He said this sentence was confirmed by the supreme courts and performed with rituals.

²¹⁵ Bazgi Ibid. 1998 p. 69, Issue No, 3017 in 1995. In this case five young men sentenced to death, because they had cruelly killed four old men and women to steal their money. They were simply burglars and murderers; just one of them had a knife, but because of their calamitous way of killing judge described their act as armed burglars that disturbed social security(IPC article 185). As result he sentenced all of them to death. His sentence shows that he is highly affected by the social attitudes. He called them, Satan, mother of corruption, cruel and so on. Surprisingly supreme courts uphold this sentence.

²¹⁶ For example, in crimes like theft and robbery²¹⁶, drinking²¹⁶ and sexual intercourse by unmarried men or women, it is believed that, delinquents should be killed when they have been punished three times for the same crime and commit that crime for a fourth time. This means that they receive a clear message frequently (100 lashes for an unmarried rapist, for example) while he or she is neither rehabilitated nor deterred. Then, there is no choice except removing this incorrigible evil from society.

²¹⁷ Arberry *et al* 1991, p. 732-733

²¹⁸ Abrahamian 1982, p. 535

cited as the most important aim of the judicial system.²¹⁹ In Iranian culture, when someone talks about miscarriages of justice, it means that criminals have gone unpunished. Conceptually there are connections between justice and certainty of punishment. Justice is against any discrimination and differentiation between various criminals because of their social, political, financial position. And yet it has been and is the case that justice is meted out only to poor people.

Considering crime as corruption has had a deep effect on the Iranian criminal justice system. The idea of corruption carries a strong sense of immorality and religiosity. In particular, it indicates an illicit relationship between a man and a woman, which is considered as the most striking symbol of corruption. During the two last decades, however, the term corruption has been applied to such a vast range of behaviour that it has covered almost all anti-religious crimes,²²⁰ including terrorist activities,²²¹ economic²²² and anti-security²²³ crimes. Indeed, this originally religious term has been purposefully attached to various crimes in order to achieve public support and justify harsh penal practice. Corruption has gradually become a strong symbol of serious anti-social behaviours. *Corruption on Earth* as a Quranic term was employed in some legal

²¹⁹ For example, the first Deputy of the judiciary recently announced that the "establishment of justice has been the most crucial concern of our Imams, society expects us to let people to taste sweetness of justice. Judges must immunise themselves against any external pressure and manipulation. Ra'eesi 20- 08-04 ISNA.

²²⁰ IPC, Op. cite, Article 515.

²²² Law of Disturbance in Economical System 1991, 16- 02-05 ISNA.

There is particular institution that called Institution of Combat Against Economical Corruption. Heads of three braches (president, speaker of Parliament, and Head of judiciary) are main members of this institution that harmonize fight against economical corruptions.

²²³ IPC, *ibid* Article 507. Armed and non-armed anti-regime groups called by this article as corrupted groups.

texts without any legal definition or fixed theoretical explanation. However it indicates the highest level of corruption, in the most serious crimes. Any economic crime,²²⁴ or crime against property or the person could reach the level of corruption on Earth.

Practically, revolutionary courts can prosecute offences as corruption on earth if they vastly affect society in political, economic, moral or emotional aspects. For example, the murderer of 22 children in the pakdasht case was sent to Revolutionary courts to be prosecuted on the base of corruption on Earth. This conception initially had highly religious, moral and social colour, but nowadays it has a rather more political bent, since this term is applied mostly by the Revolutionary courts against opposed groups and sometimes dissidents, like in the Aghajari case.

Because the political system was aware of the power of public antagonism against corruption, it has since tried to expand an initially moral and religious conception to other areas of anti-social and illegal behaviours. In a Durkheimian sense, society employed a strong religious symbol in defence of social values. The role of political considerations in manipulation of these kinds of powerful sacred conception cannot be ignored; but, more importantly this shows that there are strong contexts of religious collective sentiments that are ready to react or support punitive reaction against these sorts of immoral conduct.

²²⁴ Ibid Article 2

II-2 Changing Attitudes toward Punishment

Strong belief in religion and the sacred nature of social, moral and political issues in Iranian society endowed penal practice with an expiatory and vengeful character, and led to the establishment of harsh penal policy in Iran post-revolution. Sacred ideas and social sensibilities, as very powerful social forces, strongly react against encroachments on the moral domain. These emotional responses, associated with political considerations, played a crucial role in the establishment of harsh criminal justice. After the Islamic Revolution in 1979, the potential and historical social dynamism of religious forces materialized in social engineering, in policy-making in general and penal policy in particular. Thousands of sacrifices, during around ten years of civil and foreign war, strengthened and institutionalised the religious emotions that had erupted during the revolution. The period of war and civil crises was a key opportunity for politicians to expand, materialise and express these sacred emotions in Iranian penal policy. It was taken for granted that enemies of religion, values and the nation supported the Shah's regime and were producing this war and other social disturbances. For around twenty years, the dominant discourse was that 'we have given blood' for these religious and moral values, justice, equality, family, virtue, and a utopia of divine society with no immorality, sin and crime. These enthusiasms, accompanied with a strong belief in a sophisticated omnipresent enemy who endeavours to destroy or undermine the foundations of these aspirations, amplification of these kinds of sentiments through mass media and the manipulation of political actors and agencies, brought about a highly suspicious and harsh attitude toward criminals as agents of the enemy, and great attention

toward penal practice as a defensive weapon of social integration and a destructive weapon against enemies.

Religious and social expiation is one of the significant characteristics of penal practice in Iran. Offenders are socially and morally in debt for their offences. They are seen to have injured or undermined social morality and only their suffering can lead to redemption. There is no room for utilitarian or rehabilitative considerations, in particular in serious crimes that have seriously wounded social sentiments. For example in the Pakdasht case mentioned above, the offender was sentenced to 16 deaths and 100 lashes on his bare back that had to be delivered before his execution in front of people in public place.²²⁵ Humiliation of criminals and their flogging before execution cannot follow any aim other than expiation, suffering, vengeance, and the imposition of shame and retribution.²²⁶

Moral principles, in particular in the sphere of the family, are strongly held in Iranian society. The institution of family is morally and religiously regarded as sacred. According to Iranian constitutional law, "since the family is the fundamental unit of Islamic society, all laws, regulations, and pertinent programs must tend to facilitate the formation of family, and to safeguard its sacredness and the stability of family relations on the basis of the law and the ethics of Islam."²²⁷ There is a list of cruel penal practices

²²⁵ BBC News Persian, 31/03/05

²²⁶ As the media reported, these ceremonies were still insufficient to satisfy the thousands of people who gathered to witness his death - they cursed him and asked officials to let them punish him. A teenager struggled to kill the criminal and stabbed him before performance of his punishment. See: ISNA 16-03-2005

²²⁷ Constitution Law 1990 Article 10

that safeguard the sanctity and stability of the family. Vindictive punishments for free sexual relationship especially for adultery, homosexuality between men or women, bad *hijabi*,²²⁸ relation between girls and boys before engagement, and so on are symbols of the powerful moral principles of the family, and will of the policy - makers to preserve it. All official and non-official police forces, in particular volunteer forces, are highly motivated to deal with this group of crimes, by bringing them to justice or preaching and preventing them in streets and public places. For example, "police forces found 390,318 houses of corruption²²⁹ and destroyed 16,000 bands that performed in 2002."²³⁰

If the moral foundations of the family are crucial, it is partly because the family is seen as the most essential constituent unit of society and every deficiency in its fundamentals directly destabilizes social ethics as foundations for social solidarity. Iranian judicial officials consider the moral foundations of society as a whole vital, because "society will be at risk if morality in society is violated."²³¹ For Iranian politicians and the judicial system, the "borders of beliefs are more crucial than geographical territory, and so public prosecutor's offices must strictly approach violators of moral and social rights."²³² As will be discussed below, although social mentalities and sensibilities have transformed considerably in Iran, Iranian society remains highly

²²⁸ It is believed that appearance of women in public places without proper clothes and showing their beauties to others undermined moral standards and damaged institution of family.

²²⁹ Ghalibaf Bagher Iranian Chief Police, 09 -31 - 2003 Iran Newspaper

²³⁰ The terms of house of corruption refers to places where prostitutions are working and a place where mixed parties including mixed dancing and drinking are happened.

²³¹ Dorry Najafabadi, Iranian General Prosecutor, 05 -09 - 2005,. Iran Newspaper

²³² Ibid

sensitive to moral issues like *Namooosi*.²³³ As an Iran Newspaper reported on the first of February 2003, the ritual public execution of four young killers by the names of Vahid, Majid, Ehsan and Kazem was performed, in Farahani Square of Arak city (centre of central province), in front of crowd. They had kidnapped and raped two girls. The Head of Arak Bureau of justice delivered a speech before their execution by hanging. He said: "anybody that breaks the front of family and encroaches on it must be hanged by scaffold of retribution because they have made obscene behaviours and injured public decency. Youth must respect moral principles."²³⁴

Political and judicial systems consider themselves as safeguards of all legal and normative rules. Any violation of these sacred social values are repressed intensely. Moral and victimless crimes are widespread throughout the Iranian Penal Code, with a particular chapter devoted to "Offences Against Public Morals and Decency".²³⁵ Any immoral activities between men and women, excluding adultery, such as kissing, any publicly illicit act, improper hijab, managing a property where activities against public morality take place, encouraging people to violate public morals, or any activity related

²³³ Namooos includes closer female relatives including wife, daughters, mother and sisters. In some more traditional areas it may includes other relatives as well. Namooosi murderers nowadays is a complicated social and judicial problem in some area of Iran. In particular in Arab residence provinces such as Khozestan. Head of Bureau of justice in Khozestan province reported that: during last month (Oct. 2004) 13 Namosi murders happened in this province that ten of them are committed by members of family, (typically husband brother and father of a woman). He said; they tried to transform nature of their acts and disguise it as suicide or accident. (ISNA- 24/02/2005). Member of family co-operate to kill who has committed adultery or other irreligious sexual relationship, they ask somebody to kill her. Then, they do not report that event. If it is revealed, they will not demand retaliation and murderer will be release at most after few years imprisonment. This problem was highly problematic until 1997, because there was no penalty except retaliation. As a result these kinds of murderers were absolutely released. In 1997 parliament added imprisonment for those murderers that for some reason are not retaliated. (IPC Article 208)

²³⁴ Iran Newspaper, 1/2/2003. Simultaneously the same newspaper reported that four members of a second band of girl hunters. (Those who kidnap girls in order to rape are called girl hunters) by the names Mohammad Ali; Davood and Nader would be publicly executed in the same city.

²³⁵ IPC, Op. cit, Chapter 18

to pornography and the sex industry that injures public morality and decency are regarded as relatively serious crimes that faced flogging, prison or fine.²³⁶

The media, in particular independent newspapers, play a crucial role in intensifying public consciousness toward crime and criminals. The judicial system, police and security officials are often seen as having failed in their job.²³⁷ "These catastrophes (serious crimes) show that all levels of society are insecure."²³⁸ People do not want officials to apologize; they want security and safety, for society and for their children.²³⁹ In another case, relating to "Black Eagle" who had raped nine children in Mashhad, the Khorasan Newspaper wrote: "in these kinds of crimes that injure public decency criminals must be harshly punished. Although their public execution is temporarily calming, after that officials must reassure people about security."²⁴⁰ But sometimes, emotions against moral crimes are too profound to require media motivation. Occasionally these feelings are so strong and destructive that media and other officials are obliged to make great efforts to tranquilize them.

However, there is a kind of interaction between collective sentiments and individual emotions in punitive reactions against moral offences. According to Durkheim, it is true that social sentiments are constituted by the collection of individual feelings, but collective consciousness is an independent entity that can put individuals under heavy

²³⁶ Ibid., chapter 18 Article 637 - 641

²³⁷ Etemad Newspaper 20/8/2004

²³⁸ Shariati, Reporter of Social Commission of Parliament's. Etemad Newspaper 20/8/2004

²³⁹ Ibid

²⁴⁰ Sa'eedian, Khorasan Newspaper 28/02/2005

psychological pressure. These social forces are sometimes so strong that it is impossible for persons to act differently. For example; Iranian people, in particular in more traditional and less-modernized provinces, are highly intolerant and prejudiced about their '*Namoos*'. Any contact with them out of legal or religious engagement, even with their consent, or any verbal insult, gives rise to highly dangerous and wildly aggressive sentiments. The result of these encroachments on *Namoos* is typically eternal hostility or homicide. These kinds of emotions are totally out of control, because in such conditions feelings of humiliation and vengeance are so powerful that one cannot think about the ramifications of his behaviour.

These feelings of social humiliation and embarrassment multiply the sensation of vengeance for individuals and force them towards an immediate and cruel punitive reaction. For example, a 23-year-old man burned and killed his sister; she was in the ninth month of her pregnancy due to being raped by a man who had eventually married her. The accused said in front of the court; "my family has lost its reputation, all people in the village shouted and clapped when my sister came to our home. All people hold me up to ridicule and life was impossible for me.... He was sentenced to a six-month imprisonment and to pay half of the *deyeh* (blood money) to the victim's husband."²⁴¹ It is not immediately obvious, why he was sentenced so leniently, for according to IPC, in such cases the guilty must be sentenced to at least three years imprisonment.²⁴²

²⁴¹ Bazgir 1998, P. 79 this sentence was upheld by 27th branch of Supreme Court in 1994

²⁴² Op. cit, IPC Article, 208 In a similar case, the accused killed the victim because he saw his mother alone with him in a building, and assumed them to be having an affair. The judge sentenced him only to *deyeh*, claiming that he honestly believed that he deserved to be killed, because his belief in his mother's infidelity was reasonable. (Ibid, IPC, Article 295 this Article provided that; if somebody honestly believed that victim deserved to be killed then revealed that he has made a mistake he is not murder. If he proves his

The above cases show that these individual and collective sentiments are so strong that, penal policy makers and judges cannot ignore them. They have to observe these attitudes and express them in their policy and judgement. These social forces make it hard to take stance against Namooosi crimes. There is a kind of privatization in the performance of punishment; it is permitted to kill violators of yours or others' Namooos. One can kill his wife and her lover if he finds them having a sexual relationship. Further, there are harsh penalties for criminals in this area including; stoning,²⁴³ public flogging,²⁴⁴ death penalty,²⁴⁵ cutting hair as a humiliating penalty,²⁴⁶ exile²⁴⁷ and so on. As society supports these types of homicides, and occasionally even admires them, the judicial system has shown a kind of sympathy to these Namooosi murderers.

These social sentiments are not originally rooted in religious ideas. Rather they have gone beyond religious permissions or recommendations. Islamic law allows you unlimitedly to defend your or others' Namooos,²⁴⁸ but you are not authorized to follow your vengeful emotions after that or commit crime in any sexual relationship except sexual intercourse. You are not legally or religiously permitted to go further and perform

claim (that victim legally deserved to be killed), he will be acquitted. If not it will be considered as accidental killing and he will pay *Deyeh*.) Judges lend a sympathetic ear to criminals in such cases, illustrating how the judicial system can be affected by the collective sentiments.

²⁴³ IPC. Op. cit, Article, 83

²⁴⁴ Ibid. Article, 84,86

²⁴⁵ Ibid. Article 82

²⁴⁶ Ibid. Article 87. This complementary punishment is delivered only for men, because showing women uncovered and without scarf is an obvious sin.

²⁴⁷ Ibid Article 87

²⁴⁸ Ibid, Article 61. In IPC you are allowed to defend your or other's life, Namooos and property. This defence is not limited. It can be continued up to elimination of risk, but general conditions of defence like necessity of defence, proportionality of risk and defence and commencing from less dangerous act and so on are required.

punishment. How, then, can one justify such harsh reaction on behalf of society and individuals? If we refer to Durkheim's theory of society as the source of religion and conception of sacred, it can be said that religiosity of social phenomena is not necessarily rooted in religious texts or official religion. Society creates sacred conceptions where it is necessary to defend its fundamental values, even though they seem officially irreligious. Namoos is an extremely sacred issue and causes highly emotional reactions that are prohibited according to official religion.

There are politically closer relationships between conservatives as a ruling group, particularly in the judicial system (especially criminal courts), and traditional social sentiments. Powerful religious groups put the judiciary under pressure to show zero tolerance to social corruption and immorality. For around 20 years, after any weekly Friday prayer, in every routine demonstration, in every public meeting there are cries of ; "God is greater, death to hypocrites,"²⁴⁹ "armed traffickers should be executed", "armed hypocrites should be executed" and so on. These religious mentalities and public panics are resonant with Iranian crime control policies and punitive reactions

²⁴⁹ It is a well known terms that attributed to leading opposition group by the name, "organization of Mojahedin of Iran's people." They had a class-based or a Marxian interpretation of Islam. In 1982 this group started to fight militarily against Islamic Republic of Iran.

III Majesty of Punishment and Mercy

The above discussion of harsh legal punishment in Iran cannot fully explain the Iranian penal system. There are significant obstacles to the performance of punishment, so that a considerable portion of punishments, fully or partially, becomes impractical. Mercy in general and mercy for criminals (even murderers) is a Quranic principle.²⁵⁰ Public mercy through legislation and private mercy, in particular through the Supreme Leader,²⁵¹ exempt partially or fully a large number of convicted criminals from punishment. There are charitable institutions that pay for those criminals that are jailed because they cannot afford to pay their fines or financial damages.²⁵²

Victim satisfaction is a determinant factor in the mitigation or cancellation of punishment in a considerable number of crimes. For example, in retaliation rituals of murderers in front of the victim and criminal's family, there are intentional delays. Officials and the murderer's family try to create an atmosphere of sympathy and convince the victim's family to forgive a miserable man or woman who is spending the last minutes of his life. Indeed, it often happens that the victim's family remove the rope from the murderer's neck. It should be noted, however, that victims or their family have no role in the prosecution or performance of penal practice in moral crimes like adultery, homosexuality, and crimes against religion and government.

²⁵⁰ Quran, Sura 1, Versus 178 and 238

²⁵¹ According to Constitution law Article 110 supreme leaders is privileged to pardon criminals. For example in last anniversary of revolution 3401 criminals released through his pardon. ISNA. 10-02- 2005

²⁵² A charity institution by the name Emdad Committee paid for 8000 prisoner and released them from jail. ISNA. 6/2/2005

Moreover, Islamic criminal procedure in serious crimes like adultery is so complicated, that it is as if there was no intention of sentencing or delivering the penalty. In adultery, there must be four impartial and virtuous female witnesses (while those who seeks to see such scenes cannot be considered as righteous) that have fully witnessed the sexual intercourse; they are questioned individually and the most trivial difference between their statements leads to their flogging. A reasonable repentance by an accused could cancel the performance of punishment.²⁵³ According to religious principles judiciary officials must not insist on proving the case.²⁵⁴ "The accused should not be under pressure to confess, rather it is religiously recommended that criminal should not confess."²⁵⁵ He or she should confess four times in front of judges, as "confession in front of other officials like inspectors, prosecutors, and police officers are not valid."²⁵⁶ Closer attention shows that, these are almost impossible crimes since the restrictions of proof are so great.²⁵⁷

These conditions become more difficult when criminals are to be stoned. In this case it must be proved that they (married men or women) have had good sexual relationships with their spouse, and there is no disruption in their sexual relationships- their claims about these obstacles will be accepted unless judges reasonably believed that

²⁵³ Bazgir, 2001, p. 121

²⁵⁴ As a lawyer, I witnessed a case that a man had applied to the court for divorce certification because his wife had committed adultery. His wife was ready to confess, but there was no question about her offence. The judge asked some questions about divorce and issued the divorce certification.

²⁵⁵ There are two famous cases of adultery that managed by prophet Mohammad and Imam Ali: that cited in Sunni and shi' at traditional texts. In both case they tried to prevent from accused confession. They tried implicitly to introduce some reason for their exemption from punishment. In one case Prophet Mohammad threatened the accused and said you confessed three times, if you repeat I have to deliver God's decree. After performance of punishment inam Ali said; I wish he had confessed in front of God not me. One must not disgrace himself. See Hor Amoli 1973,p. 327-8 ,

²⁵⁶ Official Newspaper 1992, p. 23

²⁵⁷ Ghavami (a clergyman and previous MP) 30-01- 2005 MP ISNA

they are lying. It is essential to note that in my experience and observations²⁵⁸ the legal and religious obstacles mentioned are not always actual barriers to the presentation of punishment, because there are a lot of judges who are not familiar with these theoretical and legal grounds, most of the accused are not familiar with their legal rights and in the most cases lawyers are not present. The accused assume that their confession would be effective in mitigation of punishment. Most of them do not know that is it possible for them to deny what they admitted in front of police officers. The police are enthusiastic in proving the case, mostly through confession, and often under pressure.

The conditions of judgment and sentencing become harder in performance of *had* in theft (Cutting off of the hand)²⁵⁹. There are around thirty stipulations that must all be met for the performance of the punishment. For example, the thief should not be in circumstances of misfortune, the property must have been sheltered and protected carefully, the owner must request the punishment or the offender can buy the property, or repent before prosecution, and so on²⁶⁰. Since accomplishment of these conditions is very difficult, in most cases judges do not initially consider the theft as crime that leads to the *had* but rather as a normal theft.

²⁵⁸ I have worked simultaneously as a lecturer in University and as a lawyer in criminal courts for 8 years in Mashhad (Second city of Iran after Tehran capital city)

²⁵⁹ It should be mentioned that these conditions are applied in *Haddood*. Sever punishments like stoning, death penalty, relation and so on. Tazirat need not these procedures of proof.

²⁶⁰ IPC, Op. cit, Articles 197-203

The presumption of innocence is, theoretically a constitutionally and authoritative principle in Iranian criminal procedure.²⁶¹ This standard is reinforced by the other well known rule in serious crimes -*Dar'a*- which means that judges must be one hundred percent certain in their sentencing: even a trivial hesitation is considered as an absolute obstacle to sentencing an offender to a harsh punishment. There are a considerable number of sentences that are overturned in supreme courts because it is believed there were some petty doubts. For example in typical case where two young men confessed their homosexuality and court sentenced them to death, Supreme Court overturned the verdict, because there was a doubt about offenders' repentance. The Supreme Court documented his verdict by *Dar'a rule*.²⁶²

Broadly speaking, in addition to what has been said above, there is a gap between the sentence given and punishment itself in the Iranian criminal justice system. For example, according to Islamic jurisprudence, the penalty for apostasy is death. After the Islamic revolution hundreds of thousands of Iranian youths explicitly announced that they had become communist, and that they explicitly co-operated with communist groups. They had plainly committed apostasy, but none of them were prosecuted. The age of criminal responsibility religiously and legally is 15 years old for boys and 9 years old for girls, but it is claimed that "for the last seven years no young man or woman under 18 has

²⁶¹ Constitution law 1990, Article 37, provided that, Innocence is presumed, and no one is held guilty of a charge unless his or her guilty is established by a legally authorized court.

²⁶² Bazgir 2000, p. 125

been executed.”²⁶³ The judiciary has currently sent a bill to Parliament to the effect that execution for under 18s will be legally abolished.

²⁶³ Hajmohammadali Fahimeh 16-01-2005. ISNA. As a social service officer, he said; there are 30 under 18 murders in Rehabilitative and Training Bureau of Rejaee Town that are sentenced to death but they are not executed yet. We are struggling to ask victims' families forgive them. Similar conditions can be seen in similar institutions.

IV New Society, Change and Anticipation

Nowadays Iranian society seems different from what we have seen during last two decades. A religious society with strong religious sentiments, a strict belief in the relationship between mosque and state, high moral standards, and strong social solidarity and political consensus among politicians, is to be replaced with profound practical and intellectual doubts about all these factors. Youth in general (70% of the population) and universities' students in particular, as the engine of social movements in recent decades, are faced with epistemological crises. They are anti-ideology and anti-political. Recent research has shown that: "They are influenced by the technological revolution, metaphorical world (internet), human rights and individual identity"²⁶⁴ and the gap between generation has increased. A comprehensive study among 27, 000 Iranian youth indicates that patterns of behaviour have changed, and behavioural patterns are focused on popular groups such as artists (mostly actors and actresses 27/5%), athletes (26/5%) intellectuals (21%), clergymen (6%) politicians (3%) and so on.²⁶⁵

The emigration of intellectuals is an acknowledged problem and a serious concern for politicians, especially reformists, in Iran. The cause is, arguably "because they (intellectuals) feel they have lost their social and political dignity."²⁶⁶ Immorality and weakness of religious faith are crucial concerns of both conservatives and reformers in

²⁶⁴ Zarifian 22 – 09- 2004 ISNA. Deputy Minister of Science, Research and Technology. He added that it does not mean that they are not religious any more, rather they are not satisfied with traditional sources and interpretation of religion.

²⁶⁵ Lotfabadi , 2004, pp. 12-30

²⁶⁶ Zarifian , Op. cit

Iran. They believe that, "hopelessness, indifference and lack of belief are increasing, it is an alert."²⁶⁷

As if Islamic culture has not influenced our education system, there is no colour of the Islamic culture among students, Ramadan and non-Ramadan month makes no difference for students....[to]usurp religiously is worst than alcoholic drinking but, unfortunately it is sometimes frankly and sometimes invisibly increasing.²⁶⁸

Many surveys show that immorality, and crimes have increased.²⁶⁹ Social structures like the family are damaged and the gap between men and women's crimes has decreased.²⁷⁰ In words of an Iranian criminologist "we are faced with parents resignation phenomena."²⁷¹ Despite all the restrictions and the severe approach to violent crime rates, alcoholic²⁷² drinking and addiction²⁷³ are very high. Nowadays social deviations including, "escaping of girls from home, domestic violence, begging, drug addiction and moral corruptions have increased annually by 15%".²⁷⁴

Some sociologists believe that Iran's new social and structural conditions are obvious signs of an anomic society. Dominant social values have been undermined and

²⁶⁷ Zibakalam 2/7/2005 ISNA. He (as a famous moderate reformer) said; we will arrive nowhere, until politicians will not accept problems.

²⁶⁸ Jannati. 22-09-04. Tehran, Friday Pray's Lecturer. ISNA

²⁶⁹ Sina Press, 22-09-04

²⁷⁰ Khorramjo 25-05-05 Iran Newspaper

²⁷¹ Azazi 20- 10- 04, Iran Newspaper. As a sociologist she believed our culture faced with fundamental challenge in interaction with modernism.

²⁷² Illegal transaction of wine in Iran estimated 40 million liters per year that cost 400 billion Tomans, around 500 million dollars. www.bastab.com 23 Sep 2004

²⁷³ Akbari 01-03-05 ILNA

²⁷⁴ Motamedi 04-12- 04 ISNA

new values are emerging but as yet are not established. It is a period of transformation from a traditional society to a modern one. This transformative circumstance and anomic condition has "influenced all dimensions of social life, from driving, individual's morality, social morality to the management system of the country."²⁷⁵ The social crisis, anomic and normlessness in Iranian society "supported by a recent survey carried out among the youth"²⁷⁶ As a conclusion of this survey the current decay is called a "period of social, economic and political anomy."²⁷⁷

However, according to my thesis, such formations should be repeated in penal practice as an index of society. Although we must wait to see the full consequences of these profound transformations that have started to occur in Iranian society, I want to suggest that these changes are very real. Even now, voices of change can be heard in the Iranian criminal justice system. The criminalization movement has stopped and decriminalization has been introduced as a policy by the head of judiciary. He has insisted that, "decriminalization, limited use of prison, and rehabilitation of criminals must be our continuous agenda".²⁷⁸ For him, these are part of the real Islamic penal policy. Cutting off the hands of thieves and stoning are practically omitted from Iranian penal practices.²⁷⁹ Public flogging is seriously questioned²⁸⁰ and now is performed behind walls. Furthermore Imam Khomeini has been quoted that "if there are, internally or internationally, negative effect for public punishment which give rise to suspicion to

²⁷⁵ Baghi 26/12/04. An interview with Radio DW-World. DE DEOTSCH E WELLE.

²⁷⁶ Marja'ee 2003 , p.1

²⁷⁷ Ibid

²⁷⁸ Hashemi Shahroodi Head of judiciary. 25- 10- 04 ISNA

²⁷⁹ Alizadeh Abbasali Head of Tehran's Bureau of justice 18 -02-05 See; www.bastab.com

²⁸⁰ Izadpana Social Deputy of Judiciary, 10- 08- 01, Iran Newspaper

Islam, all of them should be stopped.”²⁸¹ Permission for abortion in particular conditions, a scientific and rational approach to crimes like addiction- for example distribution of hygienic ampoules amongst addicts, instead of their prosecution- are patterns of the new penal policy in Iran. Once social conditions, thoughts and feelings are transformed one can expect alteration in penal policies.

Nowadays punishment has become a controversial subject of challenge between reformers, who have been supported by public opinion in the previous three elections (two presidential elections and a parliament election), and conservatives.²⁸² Even some moderate conservatives like Ayatollah Makarem Shirazi have joined the criticism, saying, “if punishments carried out in public have an adverse effects on public opinion, they should not take place in public.”²⁸³ Reformists are saying these kinds of penal practices “are an attempt by Islamic conservatives to discredit the reformist government.”²⁸⁴ Despite resistance to the idea of change, alterations in the social climate have gradually put the criminal justice system under irresistible pressure. Last year the head of the judiciary stopped a considerable number of death penalties. When he ordered the stopping of the execution of three hijackers, it was regarded by some reformists as “a step forward.”²⁸⁵

²⁸¹ Rahmani Representative of Supreme Leader in Police Forces. 10- 08- 01 Iran Newspaper

²⁸² A row has broken out in Iran over the growing number of public floggings of young people accused of drinking alcohol or making sexual advances. BBC News World Middle East 15 Aug 2001

²⁸³ Ibid

²⁸⁴ Ibid

²⁸⁵ Baghi 23-01- 05. Shargh Newspaper. He is head of NGO by the name Association of Prisoner Rights and a well-known reformist that struggles for transformation of Iranian penal policy. In above article he tried to show that, once public opinion hated punishment like death penalty, Islam does not allow you to perform it.

As a top Iranian judicial official recently said; "Iran may alter its system of capital punishments and could release some jailed political dissidents. The judicial system is striving to become more modernised, more responsive, less politicised."²⁸⁶ He continued that stoning was suspended last year "because it was prompting sympathy with the victims, not due to pressure from the European Union."²⁸⁷

Although Iranian judicial officials pretend that international pressures have no influence on their decision-making, for me, the effects of the globalization process on transformations of Iranian penal policy are undeniable. This process has systematically, put forceful pressure on the criminal justice system. On the one hand, globalization, through massive systems like the Internet or satellite has deeply communicated with Iranian culture. This connection has transformed previous social attitudes towards the west. As the grandson of Imam Khomeini, on the 26th anniversary of the Islamic Revolution, said; "the most bitter point of our history is that some of us fall in love with their killers. They endeavour to rationalize, theorize and make a philosophy for American crimes (in Iraq and other countries). It is the biggest stupidity."²⁸⁸ Changes in cultural and political grounds as a result of globalization have led to critical attitudes toward harsh punishments. "The wave of sensational public hangings and whippings has drawn criticism from reform-minded (and majority elected) officials who claim that such

²⁸⁶ Larijani. The judiciary's head of international office. 23-01-04
<http://www.iranexpert.com/2004/judge23january.htm>

²⁸⁷ Ibid

²⁸⁸ Khomeini Hassan 11-02-05, Fars Press

punishments might harm Iran's reputation abroad at a time when president Khatami fights hard to project Iran as an example Islamic democracy in the world."²⁸⁹

On the other hand, western international institutions like Amnesty International, international NGO's and the like have tried to influence Iranian penal policy through threats encouragement, boycotts and so on. For example, the EU is engaged in a long process of negotiation with Iranian officials in order to simultaneously stop Iran's nuclear program and involve human right considerations in the performance of punishment.²⁹⁰ Iran's judiciary co-operated with UN human right officials in 2003, after seven years disconnection. As a judiciary official said; "it will continue despite the substantial international criticism."²⁹¹ He said: "all punishments in Iran could undergo a revision. We are not annoyed by a request for revision from other groups or countries, we are annoyed when we are accused."²⁹² An Iranian Nobel Prize winner of 2004 Shirin Ebadi, due to her great efforts in human right activities in Iran has lead a critical discourse in the sphere of penal practice. Her international position is a firm obstacle in the way of any criminal prosecution. It is, however, crucial to recall that many punishments that are nowadays negotiable were originally God's decrees. For me this is the start of a profound change in Iranian penal policy.

Both movements, toward a severe penal practice after the Islamic Revolution in 1979, and the new movement toward a modernized penal policy can be understood in

²⁸⁹ Daily People Newspaper, Sec:
http://english.people.com.cn/english/200110/04/eng2001094_79340.html

²⁹⁰ BBC News Persian, 24 -10- 04

²⁹¹ Mohammad, Op. cite

²⁹² Ibid

light of the relationship between social structures and penal practice. An enormous social wave toward religion and religiosity of collective consciousness, in Durkheim's term, gave rise to harsh penal policy. A steadfast social solidarity based on traditional religious beliefs resisted all international pressure toward transformations for around two decades. Although it is very difficult to anticipate the trajectory of Iranian society, it can be said that a gradual and partial- alteration of social religiosity is bringing about a noticeable change in Iranian penal policy.

V Conclusion

As we have seen Iranian society resorted to religion as a shelter against rapid industrialisation and modernisation, that seemed dangerous to morality as the base of social solidarity. Cultural manifestations of the West pervasively exported to Iran, were considered as representations of corruption and immorality. Society took refuge in religion and religious rituals for a revival of its normative values. This process brought about a huge movement towards traditional and religious values. Collective consciousness became religious in character, grounding and uniting Iranian society against its internal and external enemies.

The Islamic Revolution of 1979 was a product of the re-establishment of historical, social and religious forces in Iranian society. The impact of these forces was so powerful that no dam could resist. Society, with its common moral and religious standards, dominated all individuals. The revival and authority of these universal sacred norms led to stronger social solidarity. Those values and popular ideals that historically had had a latent contribution to the shaping of social structures were revived and officially took part in the re-construction of political and legal institutions. Indeed these popular religious ideals were embodied in the new forms of governmental institutions. Social values had revived and strengthened in the mixed religious ceremonies and political demonstrations. There was such a mixture of religious, moral and social values that their boundaries were blurred.

Social foundations, like social coherence, family and so on, relied increasingly on religion and became more sacred and intense. In Durkheim's terms, religion and society was a translation of one another. Social values, in coexistence with religious ideals, became more sanctified. That process went so far that finally, in 1990, the constitution confirmed that in the case of contradiction between social interests and religious rules in policy-making, the former should be preferred. Indeed, it was accepted that religious rules should not be and indeed are not an obstacle for social development.²⁹³ According to this rationale, the function of religion is facilitation of social life and not as an impediment to social progress.

As we saw, the theatrical spectacle of punishment and reproduction of the crime's meaning in the execution of the condemned, and the process of reviving and annulling the crime before the public can be analyzed from both Durkheimian and Foucauldian perspectives. The rituals of punishment can be explained in terms of the political process and the presence of the sovereign power as an active force of power's revenge, or in terms of moral expression and social revenge. However, while one should not ignore the fact that guilty people in some cases are considered rebellious and hostile, which calls for revenge, but, the content of sentences, the lectures and cries of people in front of the scaffold, the determination of harsh punishment against even minor moral and religious

²⁹³ According to the Constitution Law, article 112; the Nation's Exigency Council shall meet at any time the Guardian Council judges a proposed bill of the Islamic Consultative Assembly to be against the principles of Shari'a or the Constitution, and the Assembly is 'unable to meet the expectations of the Guardian Council, resorting to the social necessities. In such cases if, the Nation's Exigency Council confirmed social necessities and interests in a proposed bill it will be approved even though it is against original rules of the Shari'a or the constitution law. For example, exchange of blood, banking based on usury, treatment of the ill women by the male doctors and so on are originally forbidden, but if they are necessary for the individuals or the society as a whole, they are permitted. Indeed these permissions or new rules are considered as real religious rules in the new conditions. As a general rule in the shi'at every original rule could change to the secondary rule in various circumstances.

crimes, the determination of punishment according to religious legal rules, and so on, all have at the first sight a moral and religious message. Indeed penal practice indicates that any violation of sacred moral and religious standards, as the foundation of social unity, cannot be tolerated. Thus, from my point of view, punishment must be considered more as moral expression of society than a political process or technology of discipline.

The category "*Corruption on earth*" is a striking example of the affinity between religion and society and its effects in the area of criminal justice. This general label, that is synonymous with use of the death penalty, does not attach to a particular crime, as some have assumed, but rather to all economic and political crimes, crimes against the individual, moral and victimless crimes, and organized crime. Use of this term depends on the severity of a crime, and its impact on the society, in particular the amount of anxiety, disturbance and anger that is created in society. In other words "*earth*" is a symbol of the "*society*" and the Quranic term 'corruption on earth' means disturbance to society as a whole. The common elements of these crimes, and the most essential factor in considering a crime as 'corruption on earth' is that it threatens society as a whole and give rises to a whole range of indignation and anxiety in a community. If crimes only partly attack social values and structure, 'corruption on earth' includes those crimes that offend the most important value:, social solidarity and society itself. Accordingly, drug trafficking, organized and armed crimes, rebellions, serial killings, crimes against national security, government, and other crimes that threaten the social entity all are entitled 'corruption on earth'.

The above analysis paves the way for a better understanding of penal practice in the Iranian criminal justice system. As Durkheim believed, punishment is an index of social solidarity and an expression of the communal sentiments that have been violated. As we have seen in the Iranian criminal justice system, severity of punishment is related to the gravity of the crime, the sacredness of the values that are violated, and the extent of resentment and passion that they produce in the society. Social and religious values become barely distinguishable, and religious values are symbols of social values, as if they are social requirements that are embodied in religious forms. Thus, as we have seen, insult to religious values brings about a wild wind of anger and irritation among collective sentiments and by the same token a most severe punitive reaction. Punishment of the death penalty for apostasy, every insult to the great prophets, Quran and so on, are illustrative examples in this area.

However, as Durkheim believed, social facts - like those studied in this chapter - tell us that the essence and nature of penal practices, more than anything else, are an irrational and passionate reaction against injuries that have been done to strongly held social beliefs. Although these punitive reactions are originally emotional and vengeful and not directed towards any particular purpose, they automatically find their functions. The punitive response reacts against the source of the threat and tries to destroy or curtail it. As investigations in this chapter have shown, propagation of crime is deemed an efficient instrument of internal and international enemies aimed at religious, moral and cultural values in order to undermine them and destabilize social solidarity. Thus, a harsh

reaction against some criminals as the fifth column²⁹⁴ can be considered as a social action of self-defence. The more dangerous and organized are these offensive activities, the more serious a reaction becomes necessary. Conspiracy theories, the delivery of harsh punishment against moral crimes, drug trafficking, purely religious crimes, espionage, treason and crimes against national security could all be analysed in this regard.

Penal practice is a cure for the social solidarity that has received serious injury through the offence of social values. The strongly held communal ethics have been dishonoured and social sentiments are wounded and humiliated. Thus, two things must be done: rehabilitation of the collective emotions and confirmation of the majesty of social standards. Penal practice contributes to those two functions. The performance of punishment, in particular public punishment, in the Iranian criminal justice system, shows that moral values are still alive, respected and honoured. The shame and humiliation attached to the punishment becalms those communal emotions that are disturbed.

However, there are two crucial points that should be noted. Firstly, I do not claim that Durkheimian account of punishment fully explains current criminal justice in Iran. Regulations of the prison system in Iran²⁹⁵ show that, at least in theory, the legacy of the rehabilitative ideal is the dominant discourse in administration of prisons. Prisoners

²⁹⁴ A secret subversive group that works against a country or organization from the inside, as in *The right-to-life movement has established a fifth column among freedom-of-choice activists*. This term was invented by General Emilio Mola during the Spanish Civil War in a radio broadcast on October 16, 1936, in which he said that he had *una quinta columna* ("a fifth column") of sympathizers for General Franco among the Republicans holding the city of Madrid, and it would join his four columns of troops when they attacked. The term was popularized by Ernest Hemingway and later extended to any traitorous insiders. See: <http://site.answers.com/the%20fifth%20column%20>

²⁹⁵ Official Newspaper of the Ministry of Justice 1983 No. 1/18351
<http://www.ghavanin.com/detail.asp?id=1163>

are differentiated, criminologists and psychologists are present in the central prisons of the provinces, and prison officers work through a distinctive hierarchical bureaucratic system and have considerable discretionary power in treating prisoners. Those conditions, in addition to lack of access of the media to the prison, gives the prison system a kind of independency and immunisation that to some extent reduces or modifies the effect of social forces.

Secondly, as discussed above, in this, the third decade after the revolution, the intellectual and emotional content of society has rapidly transformed. The youth, as the largest part of the population, have no experience of the Shah's regime, of revolution, or of civil and external war. Instead, on the one hand, they have experienced economic, social and political problems. On the other, globalization has massively influenced their mentalities through international media such as the Internet, satellite TV and so on. As argued earlier, nowadays they are looking for different life styles, values and aspirations. This transformation does not belong only to the youth; rather now the previous generation is critically considering the last three decades and looking for reform and transformation. As Boaventura de Sousa Santos has argued, "discrepancy between experiences and expectations"²⁹⁶ is a ground for transformation. In the area of penal practice, public punishment, for example, is not a popular ritual any more. In Durkheim's terms, there are obvious signals of anomie in the new circumstances of the Iranian society. These social conditions can be considered as an intermediate stage between solidarity arising from similarities and solidarity arising from a newly conceived division

296 Santos Boaventura de Sousa, 2002, p. 2

of labour. Such recent social conditions have started to affect the criminal justice system, but more profound transformations are on the way.

Chapter VI: Conclusion

I Theoretical Approaches

The technological and bureaucratic analysis of punishment is the dominant discourse in the contemporary sociology of penal practice. The Foucauldian and Weberian approaches lies at the very centre of the literature of the sociology of punishment. All criminal justice system procedures, penal regulations, functions of modern prisons, rehabilitative treatments, welfare sanctions, strict regimes of prisons and other styles of law enforcements are now conceptualized these frameworks.

Understanding the nature and essence of punishment through processes of rationalization, professionalization and bureaucratization separates the institution of punishment from its social context, and in particular morality and religion. It is assumed that professional institutions and their expert staff are following the *right* expertise in the form of bureaucratic hierarchy and institutional demands. The Weberian literature introduces an impersonal and dehumanized perspective on punishment. Within this framework, all irrational and emotional elements are eliminated from the analysis of penal practice. The criminal justice system is considered as an isolated sphere governed by its own particular managerial goals.

The positive influences of Weberian and in particular Foucauldian thoughts in sociological understandings of punishment is undeniable, but the power of these perspectives has lead to an intellectual neglect of a crucial dimension of penal practice.

A technological approach to penal practice reduces the sociology of punishment to the sociology of management, discipline and control. From such a standpoint, the examination of the regulatory power of government and social institutions becomes the dominant subject matter of the sociology of punishment, and punishment is defined as the efforts of dominant institutions to enforce order and control, regulating behaviour in the pursuit of political and economic aims. This control and managerial -oriented perspective fails to describe comprehensively the nature of punishment in modern societies.

However, punishment should not be analyzed solely in terms of reference to power. It cannot be understood only in light of a set of power-knowledge schemes. The present study has undertaken to show that focusing on punishment as a political tactic, managerial technique, or calculated instrument for the purposive control of behaviour is misleading and misses out an essential part of penal practice. Such a superficial perspective on punishment can be misleadingly taken as pointing to the real substance of punishment. If penal practice is analysed as a method of social discipline and social order, as a technical phenomenon, however effectively designed it may be, it may thereby ignore the roots of penal practice in society itself.

I have argued in this study, that the modern sociology of punishment overlooks a crucial dimension of penal practice. Garland aptly recognized the cultural resonance of punishment, but his broad description, including both cognitive and emotive aspects of culture, is not adequate. His generic term 'culture' covering all aspects of social life is

not easily applicable to understanding the essential nature of punishment. He argues that there is a kind of correlation between culture in terms of mentalities and sensibilities and penal practice. But this argument does not by itself show how, for example, the contribution of social passions gives rise to harsh penal policies. In other words, this leaves open the fundamental question of how and why social sentiments respond to particular categories of conduct. The role of social beliefs and sentiments in the adoption and implementation of a penal system is dependent on the substance of social values. This means, discovering the nature of punishment as a social phenomenon requires more specific analysis.

A narrower Durkheimian description of culture, as a normative aspect of culture or moral culture, creates a clearer and closer link between culture and penal practice. For Durkheim the common feature of crimes is that they universally invoke well-defined and deeply engrained collective sentiments. He dealt with those aspects of culture that have acquired a moral and obligatory character. Crime is crime because it collides with collective values perceived as transcendent and corresponding to exalted sacred beliefs. The most important insight that one can gain from Durkheim is his description of the sacred and its connection with punishment in society. The definition he gives to emotions stirred by crimes is of primary importance and relevance to an understanding of punishment today. This is the unique aspect of the social process of punishment opened up by Durkheim's theory of punishment.

Durkheim argues that punishment is a fundamentally irrational, passionate and vengeful response to serious violations of the 'collective consciousnesses' which he defines as the totality of beliefs and sentiments common to the average member of a society [which] forms a determinate system with a life of its own.¹

The notion of sacred social values was addressed in passing in Durkheim's 'Division of Labour,' and fully developed in his last major work, 'The Elementary Forms of Religious Life.' There he explored the role of the sacred and its relationship with punishment; he systematically defined and interpreted the relationship identifiable in the link between religion and punishment in primitive societies; he theoretically explained the correlation between religion and society in all societies. Notwithstanding that his theory of the sacred, religion, society and punishment is a legacy so rich that is capable of explaining important dimensions of penal practice in modern society, he simply did not address the question of religion and society in modern societies. Modern thinkers like Weber and Foucault overlooked the theme of social solidarity as a moral phenomenon and its relationship with punishment. Durkheim, however, applied this concept of social solidarity as an analytical tool in investigating the mutual links between society, religion and punishment. According to him, common moral principles generate a sacred domain and thereby condition the authority of a society. In a Durkheimian framework, society is impossible without a body of sacred moral principles.

¹ Lukes (1992), p. 360

Any offence against the above-cited concept of sacred, or the deeply engrained sentiments gives in society, gives rise to a deep anger in the heart of members of that society. Indeed, a powerful religious phenomenon can be identified in his analysis of punishment and societies. Durkheim denied religion as a concept endowed with any supernatural and metaphysical characteristics: religion, for him, is nothing other than a unified system of beliefs and practices related to highly respected concepts. Such a religion could be found in traditional or civic forms. Civil religion makes no appeal to the supernatural. It is founded on community symbols such as humanity, freedom, democracy and so on.

Durkheim linked religion to sacred social forces. According to him, as sacred social principles they exist in modern societies, indeed are highly honoured in the modern world, comparable to the way in which primitive societies respected their religious beliefs. Differences between traditional and modern religions are thus more a matter of degree than of substance. A supernatural religion and its related issues are considered more sacred than human or civic religion. Conceptions such as justice, law, individual dignity, nation, democracy, and freedom are constituent factors of civil religion. These sacred conceptions are regarded as highly respectable and are considered as foundations of civil society. The deification of liberty, democracy, equality, justice and alike is evident in political speeches, parliamentary arguments, in media dialogues, court procedures, civil celebrations and so on. If laws and the outcomes of judicial processes are accepted as the last word and ultimate decision in social and individual conflicts, they are accepted by virtue of their validity as symbols of sacred social values. The

supremacy of legal rules and judicial decisions can be understood through reference to sacred moral values. In exactly the same way, unfair judgments, laws against liberty, individuals' dignity and human rights give rise to a whole range of disputes, opposition and challenges. A detailed scrutiny of penal codes in modern societies shows how values like individuals' rights and justice are shielded from acts qualified as belonging to the realm of crime. Indeed the criminal laws of modern societies can be seen as an expression of modern religion and morality in any given country.

Traditional and metaphysical religions are stronger in terms of sacred values, social solidarity and severity of punishment. More sacred social values bring about more severe social punitive reactions. Man-made religion is less sacred than a divine religion, and consequently emotions stirred by crimes in modern societies are less severe than in primitive societies. As Durkheim argued, "a transgression is correspondingly more shocking if the offended being is superior in nature and dignity to the transgressor."² The offence of man against man-made values cannot arouse the same resentment as an offence by man against godly values as a strong feeling of sympathy for individual offenders serves effectively to counterbalance the sentiments that are aroused by crime. In the case of a supernaturally sacred society, even a strong pity for the criminal cannot contradict, however, the indignation aroused by the act of sacrilege. Such sympathy toward criminals could hardly reduce the severity of penal practice, because the two sentiments are too imbalanced, and asymmetrical.

² Giddens 1995 p. 13

A provocative question, then, is whether civil religion is a one-way movement toward modernization, or whether movement towards traditional religion is a likely result of modernization. As discussed above, religion, whether supernatural or civic, is a foundation of social solidarity. If a society's solidarity is threatened by contradictions between elements of sacred social values, for example, and an individual's dignity and social interests, the existence of a foreign enemy or for whatever political, economic and social considerations, a stronger social integration than is normally expected is required. In such conditions, resort to traditional forms of religion can be a functional choice. Society has all the essential elements to produce religious sensations, and requirements of creation or revival of a sacred being, in terms of metaphysical religion. Under such conditions, society gradually or incidentally refers to traditional religious values; collective sentiments become more religious in nature.

As a result of social disintegration due to technological progress and the transformation of social structures, a great shift in sexual behavior and family structure, the rise of single parent families and so on in the USA, there arose a threat to the fabric of social integration. More or less similar patterns of high-speed modernization and westernization attacked traditions, existing moral standards and religious principles and, indeed, the structure of social solidarity in Iran. A movement toward morality and religious tradition, as the base of social cohesion, is visible in both societies; society is trying to discover constructive and positive responses for the present situation, seen to be one of social decay. Social processes of value formation, changing values in a positive manner, and instilling both a moral restoration and a spiritual renewal are dimensions of

this revolution. In such a framework, religion can be felt to be the one force in society that can help promote social solidarity. In Durkheimian terms, society had to be sheltered under a religious umbrella because it was in a dangerous situation.

As arguments in previous chapters have shown, a movement toward traditional values of order, family, religion and social authority has swept through American and Iranian societies. Indeed, what has been discussed in terms of a revival of religious beliefs and emotions, as forceful ideas and sentiments in both societies, have been more or less the result of these social transformations. The wave of backlash in late modern America, showing a serious concern for the traditional themes of order, family and authority, has put United States' penal policy under heavy pressure, with the effects of a growing process toward a new solidarity. As argued above, this process has occurred even more forcefully in Iranian society.

As a result of these processes, collective consciousness in the societies of USA and Iran has become, to various degrees, more religious: any violation of the moral and social standards has had to face harsh reactions. Some distinctively fierce American Christian and Iranian Islamic-Shi'at beliefs and sentiments have influenced penal policy makers in both countries in the last three decades. Criminal justice has become harsher, similar to what has been witnessed in primitive religious societies, where punishments are more severe and criminals have to suffer more blame and social stigma.

II Comparison Between Two Cases

There are thus striking similarities in penal practice between the USA and Iran. Divergences are mostly related to techniques, apparatuses used, and more generally to forms of punishments; meanwhile; the bases, rationale and nature of punishments in both systems are more similar than different. The humiliation of criminals, the coexistence of sin and crime, the degradation of culprits, the lack of sympathy for criminals, considering them as social enemies, inflexibility against wrongdoers, the denies of rehabilitative ideals and ignoring expertise in dealing with criminals, criminalization, increasing moral and victimless crimes, and so on, are the most crucial likenesses between the penal policies in the USA and Iran.

The presence of sophisticated technologies such as electronic monitoring, complicated facilities and the application of modernized styles of crime control and modern prison systems in the United States and lack of these conditions in Iran, does not necessarily indicate crucial differences between their criminal justice systems. Dissimilarities refer more to modes of the penal practice and to the existence of more developed technologies in delivering punishment or not, while similarities concern their content and the social message they express.

As a result of changing policies and principles of criminal justice in the USA and Iran during the last third of the twentieth century, the form and content of punishment have changed broadly in both countries. These alterations have not only occurred in

legislation, sentencing and performance of punishment, but also in pattern of law enforcement. In such a new era, crime is treated as a matter of control through controlling everyone. It has been a fight 'on behalf of the community of actual and potential victims against a community of actual and potential offenders.'³

A religious conception of human beings as rational and free individuals has led to a particular understanding of wrongdoing and an aggressive approach towards wrongdoers, an approach that for a long time had been displaced by correctionalist and rehabilitative theories. Both systems have more or less denied measures of individualization and have tended to shift their emphasis from the *offender* to the *offence*. This is because, as Durkheim believed, the main concern in criminal justice systems is that where a crime violates transcendent values, the personality of criminals, or his mental and social situation are secondary issues. Any strike against sacred social values provokes an autonomous passionate reaction.

Among the other similarities between the penal systems in the USA and Iran, are the severity of penal practice, "the revival of public shaming sanctions,"⁴ the humiliation of criminals, "degradation through punishment"⁵, social elimination policy through the death penalty or imprisonment as a kind of "social death"⁶ and stigmatizing shame "[which] involves assigning master status to a person because of his or her

³ Ibid

⁴ A book Review by J. Savelsberg Joachim, 2005 P. 229

⁵ Ibid

⁶ Joshua Page 2004.p. 372

lawbreaking.”⁷ Criminals are considered as repugnant elements that must be rejected. They are no longer like us; rather they are dangerous and undeserved outsiders who should be harshly treated. They are “fundamentally different from citizens self-evidently portrayed as law-abiding.”⁸ The members of this class are considered as social enemies and a national threat, and cannot be considered as honorable persons or enjoy social advantages. They live outside the framework of accepted social standards and were rejected by society. Denying prisoners access to higher education in Clinton’s USA, for example, illustrates the lack of room for utilitarian calculation in American penal practices.⁹ This example, like others cited in the previous two chapters, has contributed to recent efforts to develop Emile Durkheim’s expressive theory of punitive sanctions.

Another example of the expression of social condemnation in penal practice is the preventing of criminals from obtaining employment in governmental institutions and in many private organizations, constituting the majority of job opportunities in the Iranian labor market. Despite this social fact, criminologists and penologists believe that idleness and unemployment, in particular for those who are experienced criminals, is a highly dangerous situation and leads to rising crime rates. *Non-criminal record certification* is, however, still an essential document for most job applications. These examples show that society cannot easily forgive those who breach its behavioral standards. Criminals lose their social standing; in particular those who have committed serious crimes may never be able to reintegrate into society and re-achieve social statues. Even the material

⁷ Scheff 1996, p. 742

⁸ Joshua 2004, p. 368

⁹ Congress passed legislation in 1994 that denied Pell Grants— the primary source of funding for postsecondary correctional education (PSCE) — to prisoners, despite evidence that PSCE helped reduce recidivism and bolster carceral order. See *Ibid*, p. 357

compensation of victims and society through social rehabilitation will rarely return them to their original social position. Under conditions of equal qualifications for employment, those with a criminal record, even having served their sentence and been rehabilitated, are discriminated against in favor of those with no criminal record. This shows the enduring attachment of stigma attached to criminals. These examples show that punishment still has an irrational and non-calculable character. Crime implies that honoured social values are shaken, and thus crime damages their authority as a base for social unanimity.

How, then, can a utilitarian, purposive, rehabilitative and technical account explain this new image of penal practice in the cases of Iran and the USA? As argued above, both criminal justice systems have denied measures of individualization and rehabilitation and have tended to shift their focus from the offender to the offence. Is it a matter of knowing, supervision, and docility of individuals, as Foucault explained in his theory of power-knowledge and punishment? How could Iranian and USA penal practice be explained in light of rational, scientific and professional modes of penal practice? Is what is being witnessed contemporarily in both countries a sign of successfully eliminating from criminal justice organizations all personal, irrational and emotional elements which escape calculation? On the contrary, in both countries the penal practice system is not merely a technical and professional process. Contrary to Weber's ideas, public sentiments are not destructive but rather constructive of social solidarity.

Viewing punishment as tactics, expressive of a technology of power, and ignoring the role of cultural and religious forces, gives rise to an inadequate account of penal practice. In contrast to Foucault's analysis of classic punishment -that the guilty man had to be punished intensively simply because he attacked the dignity of the sovereign - punishment was inflicted harshly because he broke religious social rules. In society, sacred social values and social solidarity are the *sources* of the sovereign's dignity. According to such an analysis, sovereignty in pre-industrial societies was the symbol and guardian of sacred values. The state has been and is sacred because it is a symbol of sacred social values. Criminals must be treated harshly not only because they attack the power and "force of law [as] the force of prince",¹⁰ but also because they dishonour law as a prime symbol of divine rules. It is to be agreed with Foucault that the intensity of punishment and inequality between crime and punishment in pre- modern societies shows the presence of superior powers and active forces of revenge; but it is here submitted that it would be more correct to replace this superior power with transcendent and sacred godly values. In this case the meaning of inequality between crime and punishment, and the presence of active forces of revenge, is more plausible in light of the inequality between God and man. This is precisely what Durkheim made clear in his theory of punishment in pre-industrial society, in which collective consciousness is religious in character.

Foucault's account of penal practice in modern societies lead us to ignore important elements of the nature of penal practice. According to his theory of modern

¹⁰ Foucault 1977, p. 47

punishment, the object of the new penal policy is to influence the individual's mind and soul. Foucault argued that corporal forms of punishment disappeared and gave way to gentler sorts of penal practices. He considered individualization and corrective programs as a key trend in modern society, disguising the face of power, understood as part of a massive strategy of normalization. But, as shown, in both case studies rehabilitative programs have collapsed and attention has shifted from the offender to the offence.

The present study has tried to show how the institutions of criminal justice in the modern world are not free from social pressures or public opinion. The scientific and managerial approach, which conceives of punishment in technical terms, is not fully capable of explaining penal practice, because such a bureaucratic approach forgets the social meaning of penal practice. The differentiation and categorization of criminals as essential aspects of rehabilitative systems, the imperative presence of various bodies of scientific knowledge, and the requirements of bureaucracy in criminal justice institutions have not changed the nature of punishment, which contributes in serve social demands. Penal practice is still an expression of social sentiments linked to the feeling of damage or threat to sacred social beliefs. Both cases showed that despite the undeniable ramifications of rationalization in criminal justice, the emotional, moral and religious character of punishment has not been fully displaced. There is a correlation between the movement of those societies towards religion and the severity of punishment. Religiosity and the sacredness of social values have brought about a more punitive reaction towards criminal activities. The question of why these regressive movements toward traditional

values and religion have happened in the USA and Iran has been answered in light of Durkheim's theory of religion, society and punishment.

III Cultural perceptions, emotions and punishment

Durkheim's main theoretical interest was in the functioning and substance of the collective consciousness which cover much of what modern sociology entitles culture. This especially covered those moral aspects of culture that have an obligatory and sacred character, deviance from which brings into play sanctions typical of a society at that particular stage of development.¹¹

The history of punishment can be seen as documenting the relationship between changes of attitudes and shifts in penal practice. One of the key questions in chapter 2 and chapter 3 was how changing modes of repression can reveal an account of changing perceptions and attitudes. The present study undertook to examine how various perspectives on justice; morality, human being and state have given rise to different forms of punishment.

New criminological thoughts, since the 1970s in the USA and since 1979 in Iran have been significantly affected by religious interpretations of human nature, crime and punishment. The return of retribution in USA and Iran is closely associated with these religious sentiments. In such a perspective, offences and criminal behaviour are the outcome of individuals' free will. In the second case (Iran), for religious and traditional judges and the criminal justice system, typical conceptions of individualization, psychological and sociological factors of crimes, and other criminological notions simply

¹¹ Kenneth 1982,p. 75

seemed strange. Judges' distrust and unfamiliarity with modern criminological ideologies like rehabilitation, as well as detached conceptions like individualization, and rehabilitative treatment, were alien to the Iranian criminal justice system.

Proximity of crime and sin, and identifying more moral crimes, not only has led to a longer list of crimes but also has brought about a harsher reaction against them. Since, according to Durkheim, collective consciousness and all social values are more or less sacred in character, currently a distinction between social values and religious values is not easy. As discussed, in primitive societies one source of cultural values is religion, with consequent social reactions which are more repressive and punitive. Vengeful reaction against violating sacred issues is explosive and harsh, although it can be modified or channelled through social and penal institutions.

Moral patterns were measured as the backbone of the social entity. Then, expiation religiously and socially is one of the significant characteristics of penal practice. Offenders in both cases, albeit in different ways, were regarded socially and morally in debt. They are seen to have injured or undermined social morality and only their suffering may lead to redemption. There is no room for utilitarian or rehabilitative considerations, in particular in serious crimes. Disgrace of criminals and their beating before execution cannot have any aim but expiation, vengeance and retribution.

However, as argued in the present study, there is a positive correlation between shifting emotions and attitudes towards crime and criminals and changing penal practice.

For Durkheim, Elias and Spierenburg transformations in penal policy cannot be understood without looking at changes in sensibilities. Durkheim considered criminal law to be an index of society, and for Spierenburg changing modes of repression were reflections of changing emotions. Elias showed how emotions as part of human beings are developed through processes of socialization and civilization. The dynamic impact of emotional forces on penal policy is undeniable. For example, a shift in sensibilities and sympathy to the offenders led to the abolition of brutal and barbaric forms of punishment and gave rise to gentler ways of punishment during the nineteenth and twentieth centuries. During this period, criminals were regarded as victims of their misery and of miserable social conditions as well as abnormal personality. The sympathy for offenders was strong, as there were no victims, and society was supposed to be responsible for its own shortcomings.

However, during the late twentieth century in the USA and post- revolution Iran, in contrast Elias' thesis, the aim of reformistic emotions and sympathies turned from offenders to actual and potential victims, individual victims and society. Criminals were again viewed as free and cruel human beings driven by their untamed impulses and pleasures. The victim's right movement in the U.S.A commenced with disapproval with sympathy for criminals. The advocates of this movement blamed the criminal justice for being concerned more for the offenders than the damaged and deprived victims. The movement of victim support went further and assumed society to be the potential victim. In these circumstances penalty not only does not call for any sympathy to offenders, but on the contrary punishment is a resolution satisfying both the victim and society.

Moreover, there is an interaction between public anxiety about crime and insecurity, on the one hand, and penal practice on the other. Public opinion, as current culture, is capable of exerting significant pressure on the authorities to do something. In a majority-rule political system, politicians should 'directly reflect public opinion.'¹² On the other hand, these social conditions can be considered as golden opportunities for political actors, because politicians need issues like crime and punishment that have a relatively broad appeal. If media or politicians play a crucial role in the area of criminal justice, it is because these issues have the potential for broad social appeal. Criminal justice is a sensitive and appealing subject -- matter, that politicians and media try to manipulate.

What nowadays is known, and is discussed as populist penal policy, is very close to the Durkheimian idea of the state as representative of collective consciousness. The sentencing guidelines in the USA, and the shift away from the judicial system toward, a legislative one in criminal law in the USA, is considered to be a step toward the democratisation of the political and judicial system of the USA. It can be analysed as a movement in which there is more connection between collective sentiments and the state. The same situation can be seen in Iran's criminal justice system, as a member of the civil law family in which criminal law is fully codified, taking penal policy out of the hands of judges and giving it to the public. This broadens Durkheim's communicative and

¹² Norander Barbara 2000, p. 774

expressive theory of penalty to encompass notions of collective sentiments and the role of politicians as agents of collective sentiments.

Durkheim's theory has suffers from several limitations, in particular in the way that it views the question of the relationship between society and the state. Collective consciousness as a foundation of society simply exists in society, and actively functions as it functioned in mechanical societies. For him, punishment does merely reflect and reaffirm values that already exist in society. The state merely reflects the will of 'the people'. Durkheim's idealistic conception of the state as a representative of collective consciousness prevented him from introducing obvious notions of political power, social conflict, and from evaluating how political elites and politicians apply punishment as an instrument for their political purposes. Despite his neglect of political and economic interests and their role in social domination, as frequently pointed out in the present study, Durkheim offered great insights through his dramatic, communicative and expressive theory of punishment, a theory which cannot be abandoned.

More importantly, the subject of religion in particular godly religion should be place high on the agenda in the sociological study of penal practice. Modernization is not necessarily a one-way movement towards secularization, rationalization and Westernization, as Weber identified. Modernization can appear in light of religion in western and eastern countries. Thus, punishment should not be understood only in terms of complex forms of power and discipline, as Foucault explained. The time has arrived to

take religion seriously as a powerful cultural factor in the sociological study of punishment.

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